ONTARIO
LABOUR RELATIONS BOARD
REPORTS

March/April 2007

Ontario

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LABOUR RELATIONS BOARD
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A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [2007] OLRB REP. MARCH/APRIL

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

Selected decisions of particular reference value are also
reported in *Canadian Labour Relations Boards Reports*,
Butterworth & Co., Toronto.

2007-03979/

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The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements - The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance - Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer - Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462 307

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OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA 397

Bargaining Unit - Certification - Construction Industry - Employee - The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture - The responding party was subcontracted by a road construction contractor to perform landscaping work adjacent to the construction of a new roadway - The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry - However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture - Application dismissed

CHRIS TRANBERG & SON LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 338

Bargaining Unit - Bar - Certification - Employee - This application for certification was filed within a year of an earlier application against the same employer - Subsequent to the dismissal of the first application the employer moved its operations from Brampton to Milton (which area was not covered by the bargaining unit proposed in the first application) - Ten employees moved from Brampton to Milton and performed the same jobs - The Board found that the word "position" must be interpreted in context to avoid a result that is inconsistent with sound labour relations or the purposes of the Act - The Board found that the position of an employee is not the same unless it is with the same employer and in a geographic location covered by the scope clause of the original

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CHRIS TRANBERG & SON LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL........ 338

Certification - Construction Industry - Employee - Membership Evidence - Practice and Procedure - Reconsideration - In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis - The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence - The responding party submitted that the employee in question admitted that the signature on the membership card was his - Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL........ 396

Certification - Construction Industry - Employer - The Board had to determine the identity of the employer in this application for certification - Wallworks obtained a contract to install fabric wall panels - ACTT bid on the installation of the panels at the behest of Wallworks, but was not awarded the contract because the work had to be performed by a union sub-contractor - Wallworks retained the services of Fabric Interior, who hired T, the president of ACTT to train and supervise the work - T invoiced Fabric on an hourly basis for his time, and for the ACTT equipment used on the project - T contacted the hiring hall and supervised the employees for the duration of the project - Employee cheques were paid by Fabric, and ROEs were issued by Wallworks - The Board found, applying the criteria from *York Condominium*, that the fundamental control over the employees was held by ACTT, so it was their employer - Certification granted

ACTT INSTALLATION LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93........ 300

Certification - Construction Industry - Judicial Review - The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) - In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board - Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response - On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing - The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board - Application for judicial review granted

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Certification – Construction Industry – Practice and Procedure – The responding party delivered its response to the union in a timely way, but failed to file a timely response with the Board since it had not realized that its facsimile report read "Busy, no response" and was not received by the Board – The Board followed the Divisional Court's decision in *Maystar* and decided to exercise its discretion to allow the late filing on three grounds: the union consented; the union was not prejudiced since they had received the response in a timely way; and when the respondent was informed of the problem they immediately filed their response – Matter continues

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Certification – Construction Industry – Status – Trade Union – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION.. 412

Certification – Practice and Procedure – A dispute arose with respect to the status of certain individuals in this certification application – The parties had refused to sign the Certification Worksheet following the Regional Certification meeting - The Board outlined the importance of recording parties' agreement at various points in the certification process, and its expectation that parties will affix their signatures to the worksheet in recognition of their confirmed positions – The absence of a signature on the worksheet will not preserve a unilateral right to later change or add to a position – Submissions directed

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Certification – Practice and Procedure – Related Employer – Remedies – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma –

The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA.. 297

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BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462.. 307

Conciliation – Reference – The Minister of Labour asked the Board to consider whether he had the authority to appoint a conciliation officer pursuant to section 18 of the Act – With respect to the parties' relationship in one specific Board area, the parties agreed that notice to bargain had been given and there was no subsisting collective agreement between them, so the Board confirmed that the Minister had the authority to appoint a conciliation officer for the parties' dispute in that Board area – With regard to the EPSCA bargaining unit, there was agreement between the parties that the Minister had the authority to appoint a conciliation officer, but they did not agree on the existence of a current collective agreement – The Labourers argued that they had given notice to bargain on more than one occasion after the IESO was established following the 1999 dissolution of Ontario Hydro – The Board held that the communication between the parties in 2003 did not constitute "bargaining" that would have prevented automatic renewal of the existing collective agreement – A letter from a mediator confirming his acceptance of an appointment to mediate cannot be construed as a written notice from one party to the other of its desire to terminate, revise or modify a collective agreement – Similarly, the filing of an application with the Board seeking recognition of bargaining rights and a declaration regarding the applicant's rights does not amount to written notice to the other party of a desire to bargain a renewal agreement – The Board found that the only valid notice to bargain was issued in September 2006, and it would only operate to prevent the renewal of the collective agreement set to expire on April

30, 2008 – The Board rejected the Labourers' contention that the agreement ceased to operate as a matter of law because the responding party refused to recognize the union's bargaining rights – Minister has authority to appoint conciliation officer

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OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA.. 397

Conflict of Interest – Judicial Review – Trusteeship – In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 – The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" – In the Court's view, all the information held by the law firm related to the trusteeship and its litigation – Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent – Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" – Application for judicial review allowed

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ACTT INSTALLATION LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 300

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MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819; RE ONTARIO LABOUR RELATIONS BOARD 459

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GAGNON DEMOLITIN INC.; RE LIUNA, LOCAL 625 358

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PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION 412

Construction Industry – Judicial Review – Jurisdictional Dispute – The Bricklayers brought an application for judicial review of the Board's decision finding that the employer's assignment of stone masonry work on the Victoria Memorial Museum Building in Ottawa to the Plasterers was correct – All parties agreed that the standard of review was patent unreasonableness when the Board deals with jurisdictional disputes – The court found that the Board "conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful" and that there was a clear "line of reasoning leading to the conclusions reached" – Accordingly the decision was not patently unreasonable and the application was dismissed

IUBAC, LOCAL 7; RE OPERATIVE PLASTERERS, CEMENT MASONS, RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598; RE COLONIAL BUILDING RESTORATION; RE LIUNA, LOCAL 527; RE 921879 ONTARIO LIMITED; RE MASONRY INDUSTRY EMPLOYERS COUNCIL OF ONTARIO; RE ONTARIO MASONRY CONTRACTORS ASSOCIATION 454

Construction Industry Grievance – Evidence – The Labourers grieved the lay-off of the entire complement of "referred members" on a job-site, that left only "name-hires" as part of the employer's work crew – The Board examined the language of the collective agreement which advocated a 50/50 rule – The Board found the employer had no explanation (reasonable or otherwise) for the manner in which it laid off the employees, therefore it had violated the lay-off provision of the collective agreement – With respect to the subsequent recall of one employee, the Board held that a "name-hire" or "referred employee" retains his or her status for the period in the collective agreement during which the employee can be recalled (i.e., a referred employee cannot be laid off and then re-hired within the relevant period as a name-hire) - Grievance allowed, matter remitted to parties to fashion appropriate remedy

E.S. FOX CONSTRUCTION LTD.; RE LIUNA, LOCAL 506.. 346

Construction Industry Grievance - Settlement - Following a Board ruling that found the employer related to another unionized company and, thereby, bound by the provincial ICI agreement, the union filed two grievances respecting the assignment of work to its members; the employer filed its own grievance, complaining that the union would not accept its existing employees into membership; all three grievances were dealt with by the Labour Management Relations Committee of the grievance procedure, with the union succeeding on all counts - The issues were referred to the Board with the union arguing the LMRC's decision was a settlement enforceable by a Board decision, and the employer stating the LMRC did not issue a decision but if it did, it could not and should not be enforced - The Board held that the actions of the LMRC did constitute a decision, the issue to be determined being its enforceability - The Board examined the language of the iterations of the collective agreement dating back to 1992 (when an LMRC decision was in dispute) and found significance in the changes in wording referring to "parties to the collective agreement" as opposed to "parties to the grievance" - The greater precision in identifying whose rights are at stake in the LMRC decision caused the Board to reject the union's preliminary motion that the decision was enforceable as a settlement - Matter continues

INDUSTRIAL REDI-WORKS INC.; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1916.. 381

Duty of Fair Representation - Health and Safety - Practice and Procedure - The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application - The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory - The Board found that the union had acted properly; it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance - Application dismissed - Second matter to be scheduled for hearing

JEREMY WOODCOCK; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON BEHALF OF ITS LOCAL 6571; RE RONALD GOODCHILD; RE GERDAU AMERISTEEL INC.. 390

Duty of Fair Representation - The applicant complained that his trade union (OSSTF) violated s. 74 of the Act when it failed to provide him with a lawyer in his disciplinary proceeding before the Ontario College of Teachers - The Board held that a union's duty of fair representation is restricted to those matters arising out of the collective agreement, where the union enjoys exclusive bargaining rights *vis à vis* the employer - A hearing before the applicant's professional disciplinary body is not a matter that involves either the union or the employer; it is strictly between the individual and his/her governing body - Even when the union elects to represent the individual in such a proceeding, the union's conduct does not fall under the Board's scrutiny pursuant to s. 74 — Application dismissed

GILBERT MCINTYRE; RE OSSTF, DISTRICT 12 360

Employee — Bargaining Unit — Certification — Conflict of Interest — The union applied for and was successful in a representation vote for a bargaining unit of security guards in the gaming area of Georgian Downs, a horse racetrack — The employer and the racetrack argued that the bargaining unit could not be appropriate because the guards monitored other employees, some of whom were in a different bargaining unit held by the same union — The Board examined the duties of the guards, their surveillance and security functions, their interaction with other employees, as well as the union's activities, bargaining rights and constitution, and found there would be no conflict or compromise in the guards' employment duties and their union responsibilities — Certification granted, subject to gaming registration

OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA 397

Employee — Certification — Construction Industry — Membership Evidence — Practice and Procedure — Reconsideration — In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis — The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence — The responding party submitted that the employee in question admitted that the signature on the membership card was his — Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 396

Employee — Bar — Bargaining Unit — Certification — This application for certification was filed within a year of an earlier application against the same employer — Subsequent to the dismissal of the first application the employer moved its operations from Brampton to Milton (which area was not covered by the bargaining unit proposed in the first application) — Ten employees moved from Brampton to Milton and performed the same jobs — The Board found that the word "position" must be interpreted in context to avoid a result that is inconsistent with sound labour relations or the purposes of the Act — The Board found that the position of an employee is not the same unless it is with the same employer and in a geographic location covered by the scope clause of the original application — Therefore the ten employees transferred to Milton were in different positions than they held in Brampton, and they would not have been in the bargaining unit proposed in the current application had they occupied their original position — Given that the criteria set out in s. 10(3.1) had been met, the Board exercised its discretion to consider the current application since only 10 of the 30 employees at Milton had their wishes for unionization tested within the one year period and more than six months had elapsed between the two applications — Certificate issued

EXCEL TECHNOLOGIES LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS 353

Employee - Bargaining Unit - Certification - Construction Industry - The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture - The responding party was subcontracted by a road construction contractor to perform landscaping work adjacent to the construction of a new roadway - The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry - However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture - Application dismissed

CHRIS TRANBERG & SON LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. 338

Employer - Certification - Construction Industry - The Board had to determine the identity of the employer in this application for certification - Wallworks obtained a contract to install fabric wall panels - ACTT bid on the installation of the panels at the behest of Wallworks, but was not awarded the contract because the work had to be performed by a union sub-contractor - Wallworks retained the services of Fabric Interior, who hired T, the president of ACTT to train and supervise the work - T invoiced Fabric on an hourly basis for his time, and for the ACTT equipment used on the project - T contacted the hiring hall and supervised the employees for the duration of the project - Employee cheques were paid by Fabric, and ROEs were issued by Wallworks - The Board found, applying the criteria from *York Condominium*, that the fundamental control over the employees was held by ACTT, so it was their employer - Certification granted

ACTT INSTALLATION LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 300

Employment Standards - Fraud - Settlement - Twenty-three claimants had reached a settlement with one of three directors of SLMsoft Inc. - A term of the settlement released all three directors from any obligations, upon receipt of the entire payment by the director who signed the settlement - The payment was never made - The Board determined that the term of the settlement forfeiting the employees' entitlement to seek relief from directors only arose upon payment of the money - The Board also found that a director's purported letter of resignation was fraudulent and that it induced the claimants to enter into the settlement - Pursuant to s. 120(5) the claimants were entitled to an order voiding the settlement agreement on the basis of fraud - Matter re-listed for Hearing

SLM SOFT INC.; RE GOVIN MISIR, A DIRECTOR; RE EDDIE LAW, A DIRECTOR; DR. BUDHENDRANAUTH DOOBAY, A DIRECTOR; RE MURAT TAYFUN CAN ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS........... 422

Employment Standards - The applicant claimed severance pay from Brookfield Lepage, a company providing property management services, after it was replaced by Profac - The applicant was hired by Profac within 13 weeks of the replacement - As both Profac and Brookfield Lepage were building services providers pursuant to the ESA, s. 10 applied - Therefore the applicant's employment with Brookfield was deemed not to have been terminated and her employment with Profac will include her length of employment with Brookfield for the purposes of the ESA — Application dismissed

BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITY MANAGEMENT SERVICES LTD.; RE SNC-LAVALIN PROFAC INC.; RE CAROL BETTS AND DIRECTOR OF EMPLOYMENT STANDARDS.. 320

Essential Services Agreement — *Ambulance Services Collective Bargaining Act, 2001* — Interest Arbitration — Lock-Out — Strike — The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course — The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement — The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" — Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out — Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON 447

Evidence — Construction Industry Grievance — The Labourers grieved the lay-off of the entire complement of "referred members" on a job-site, that left only "name-hires" as part of the employer's work crew — The Board examined the language of the collective agreement which advocated a 50/50 rule — The Board found the employer had no explanation (reasonable or otherwise) for the manner in which it laid off the employees, therefore it had violated the lay-off provision of the collective agreement — With respect to the subsequent recall of one employee, the Board held that a "name-hire" or "referred employee" retains his or her status for the period in the collective agreement during which the employee can be recalled (i.e., a referred employee cannot be laid off and then re-hired within the relevant period as a name-hire) — Grievance allowed, matter remitted to parties to fashion appropriate remedy

E.S. FOX CONSTRUCTION LTD.; RE LIUNA, LOCAL 506.. 346

Fraud — Employment Standards — Settlement — Twenty-three claimants had reached a settlement with one of three directors of SLMsoft Inc. — A term of the settlement released all three directors from any obligations, upon receipt of the entire payment by the director who signed the settlement — The payment was never made — The Board determined that the term of the settlement forfeiting the employees' entitlement to seek relief from directors only arose upon payment of the money — The Board also found that a director's purported letter of resignation was fraudulent and that it induced the claimants to enter into the settlement — Pursuant to s. 120(5) the claimants were entitled to an order voiding the settlement agreement on the basis of fraud — Matter re-listed for Hearing

SLM SOFT INC.; RE GOVIN MISIR, A DIRECTOR; RE EDDIE LAW, A DIRECTOR; DR. BUDHENDRANAUTH DOOBAY, A DIRECTOR; RE MURAT TAYFUN CAN ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS.......... 422

Health and Safety - Cancoil challenged the Inspector's jurisdiction to make an order under s. 54(1)(f) of the *OHSA* requiring Cancoil to conduct a heat stress assessment - The Board found that on a proper interpretive approach (given the remedial nature of the Act and providing the legislation with a broad and liberal interpretation in order to protect the health and safety of workers) temperature may be one form of "physical agent" and accordingly a heat stress assessment may be the proper subject of an order by an Inspector pursuant to s. 54 of the Act - Matter continues

CANCOIL THERMAL CORP.; RE BRAD MOON, INSPECTOR; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175 325

Health and Safety - Duty of Fair Representation - Practice and Procedure - The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application - The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory - The Board found that the union had acted properly: it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance - Application dismissed - Second matter to be scheduled for hearing

JEREMY WOODCOCK; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON BEHALF OF ITS LOCAL 6571; RE RONALD GOODCHILD; RE GERDAU AMERISTEEL INC.. 390

Interest Arbitration - *Ambulance Services Collective Bargaining Act, 2001* - Essential Services Agreement - Lock-Out - Strike - The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course - The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement - The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" - Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out - Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON 447

Judicial Review – Certification – Construction Industry – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted

MAYSTAR GENERAL CONTRACTORS INC.; RE IUPAT, LOCAL 1819; RE ONTARIO LABOUR RELATIONS BOARD........ 459

Judicial Review – Conflict of Interest – Trusteeship – In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 – The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" – In the Court's view, all the information held by the law firm related to the trusteeship and its litigation – Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent – Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" – Application for judicial review allowed(Board decision reported at [2006] OLRB Rep. November December 848)

RICHARD WEISS AS TRUSTEE FOR LOCAL 183; RE ONTARIO LABOUR RELATIONS BOARD; RE ANTONIO DIONISIO AND JOHN DIAS........ 466

Judicial Review – Construction Industry – Jurisdictional Dispute – The Bricklayers brought an application for judicial review of the Board's decision finding that the employer's assignment of stone masonry work on the Victoria Memorial Museum Building in Ottawa to the Plasterers was correct – All parties agreed that the standard of review was patent unreasonableness when the Board deals with jurisdictional disputes – The court found that the Board "conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful" and that there was a clear "line of reasoning leading to the conclusions reached" – Accordingly the decision was not patently unreasonable and the application was dismissed

IUBAC, LOCAL 7; RE OPERATIVE PLASTERERS, CEMENT MASONS, RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598; RE COLONIAL BUILDING RESTORATION; RE LIUNA, LOCAL 527; RE 921879 ONTARIO LIMITED; RE MASONRY INDUSTRY EMPLOYERS COUNCIL OF ONTARIO;

RE ONTARIO MASONRY CONTRACTORS ASSOCIATION 454

Jurisdictional Dispute - *Construction Industry* - *Judicial Review* - The Bricklayers brought an application for judicial review of the Board's decision finding that the employer's assignment of stone masonry work on the Victoria Memorial Museum Building in Ottawa to the Plasterers was correct - All parties agreed that the standard of review was patent unreasonableness when the Board deals with jurisdictional disputes - The court found that the Board "conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful" and that there was a clear "line of reasoning leading to the conclusions reached" - Accordingly the decision was not patently unreasonable and the application was dismissed

IUBAC, LOCAL 7; RE OPERATIVE PLASTERERS, CEMENT MASONS, RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598; RE COLONIAL BUILDING RESTORATION; RE LIUNA, LOCAL 527; RE 921879 ONTARIO LIMITED; RE MASONRY INDUSTRY EMPLOYERS COUNCIL OF ONTARIO; RE ONTARIO MASONRY CONTRACTORS ASSOCIATION 454

Jurisdictional Dispute - Reconsideration - The Operating Engineers sought reconsideration of a Board decision confirming the assignment of the demolition of a highway overpass to the Labourers - The IUOE argued that members of a different Labourers local (than the one named in the JD) performed the work in dispute, and consequently the Operating Engineers were unfairly prejudiced in the Board's examination of employer and area practice - The Board held that it traditionally looks at the tradespeople performing the craft, not at representation rights - Similarly, the Board does not assess the skills and experience of individual workers assigned to a project, but looks to the propriety of the work assignment to the particular craft - Finally, the Board held that it was appropriate to consider the same project from both the employer practice and the area practice perspectives; these are different questions, and often the answers to them are not the same - Reconsideration denied

PRIESTLY DEMOLITION INC.; RE LIUNA, LOCAL 837; RE IUOE, LOCAL 793; RE ONTARIO ASSOCIATION OF DEMOLITION CONTRACTORS INC. 419

Lock-Out - *Ambulance Services Collective Bargaining Act, 2001* - Essential Services Agreement - Interest Arbitration - Strike - The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course - The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement - The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" - Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out - Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON 447

Membership Evidence - Certification - Construction Industry - Employee - Practice and Procedure - Reconsideration - In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis - The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence - The responding party submitted that the employee in question admitted that the signature on the membership card was his - Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. 396

Practice and Procedure - Certification - A dispute arose with respect to the status of certain individuals in this certification application - The parties had refused to sign the Certification Worksheet following the Regional Certification meeting - The Board outlined the importance of recording parties' agreement at various points in the certification process, and its expectation that parties will affix their signatures to the worksheet in recognition of their confirmed positions - The absence of a signature on the worksheet will not preserve a unilateral right to later change or add to a position - Submissions directed

PACE ENTERPRISES (1998) INC.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA........................ 410

Practice and Procedure - Certification - Construction Industry - Employee - Membership Evidence - Reconsideration - In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis - The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence - The responding party submitted that the employee in question admitted that the signature on the membership card was his - Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. 396

Practice and Procedure - Certification - Construction Industry - The responding party delivered its response to the union in a timely way, but failed to file a timely response with the Board since it had not realized that its facsimile report read "Busy, no response" and was not received by the Board - The Board followed the Divisional Court's decision in *Maystar* and decided to exercise its discretion to allow the late filing on three grounds: the union consented; the union was not prejudiced since they had received the response in a timely way; and when the respondent was informed of the problem they immediately filed their response - Matter continues

GAGNON DEMOLITION INC.; RE LIUNA, LOCAL 625.. 358

Practice and Procedure - Certification - Related Employer - Remedies - Unfair Labour Practice - The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer - As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific - The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing - In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma - The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific - Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA.. 297

Practice and Procedure - Duty of Fair Representation - Health and Safety - The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application - The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory - The Board found that the union had acted properly: it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance - Application dismissed - Second matter to be scheduled for hearing

JEREMY WOODCOCK; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON BEHALF OF ITS LOCAL 6571; RE RONALD GOODCHILD; RE GERDAU AMERISTEEL INC.. 390

Project Agreement - Sector Determination - Standing - The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board - The Canadian Union of Skilled Workers filed a sector determination, challenging the project agreement and arguing it falls within the electrical power systems sector, as opposed to the ICI sector - The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement - Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative - Application for sector determination dismissed

GREENFIELD ENERGY CENTRE LP AND BURNS AND ROE ENTERPRISES, INC.; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663.. 365

Reconsideration - Jurisdictional Dispute - The Operating Engineers sought reconsideration of a Board decision confirming the assignment of the demolition of a highway overpass to the Labourers - The IUOE argued that members of a different Labourers local (than the one named in the JD) performed the work in dispute, and consequently the Operating Engineers were unfairly prejudiced in the Board's examination of employer and area practice - The Board held that it traditionally looks at the tradespeople performing the craft, not at representation rights - Similarly, the Board does not assess the skills and experience of individual workers assigned to a project, but looks to the propriety of the work assignment to the particular craft - Finally, the Board held that it was appropriate to consider the same project from both the employer practice and the area practice perspectives; these are different questions, and often the answers to them are not the same - Reconsideration denied

PRIESTLY DEMOLITION INC.; RE LIUNA, LOCAL 837; RE IUOE, LOCAL 793; RE ONTARIO ASSOCIATION OF DEMOLITION CONTRACTORS INC................ 419

Reconsideration - Certification - Construction Industry - Employee - Membership Evidence - Practice and Procedure - In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis - The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence - The responding party submitted that the employee in question admitted that the signature on the membership card was his - Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.. 396

Reference - Conciliation - The Minister of Labour asked the Board to consider whether he had the authority to appoint a conciliation officer pursuant to section 18 of the Act - With respect to the parties' relationship in one specific Board area, the parties agreed that notice to bargain had been given and there was no subsisting collective agreement between them, so the Board confirmed that the Minister had the authority to appoint a conciliation officer for the parties' dispute in that Board area - With regard to the EPSCA bargaining unit, there was agreement between the parties that the Minister had the authority to appoint a conciliation officer, but they did not agree on the existence of a current collective agreement - The Labourers argued that they had given notice to bargain on more than one occasion after the IESO was established following the 1999 dissolution of Ontario Hydro - The Board held that the communication between the parties in 2003 did not constitute "bargaining" that would have prevented automatic renewal of the existing collective agreement - A letter from a mediator confirming his acceptance of an appointment to mediate cannot be construed as a written notice from one party to the other of its desire to terminate, revise or modify a collective agreement - Similarly, the filing of an application with the Board seeking recognition of bargaining rights and a declaration regarding the applicant's rights does not amount to written notice to the other party of a desire to bargain a renewal agreement - The Board found that the only valid notice to bargain was issued in September 2006, and it would only operate to prevent the renewal of the collective agreement set to expire on April 30, 2008 - The Board rejected the Labourers' contention that the agreement ceased to operate as a matter of law because the responding party refused to recognize the union's bargaining rights - Minister has authority to appoint conciliation officer

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059............................ 370

Reference – Bargaining Rights – Collective Agreement – Sale of Business – Voluntary Recognition – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462.. 307

Related Employer – Certification – Practice and Procedure – Remedies – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA.. 297

Remedies – Certification – Practice and Procedure – Related Employer – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate

CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA........ 297

Sale of Business – Bargaining Rights – Collective Agreement – Reference – Voluntary Recognition – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462........ 307

Sector Determination – Project Agreement – Standing – The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board – The Canadian Union of Skilled Workers filed a sector determination, challenging the project agreement and arguing it falls within the electrical power systems sector, as opposed to the ICI sector – The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement – Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative – Application for sector determination dismissed

GREENFIELD ENERGY CENTRE LP AND BURNS AND ROE ENTERPRISES, INC.; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING

INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663 365

Settlement – Construction Industry Grievance – Following a Board ruling that found the employer related to another unionized company and, thereby, bound by the provincial ICI agreement, the union filed two grievances respecting the assignment of work to its members; the employer filed its own grievance, complaining that the union would not accept its existing employees into membership; all three grievances were dealt with by the Labour Management Relations Committee of the grievance procedure, with the union succeeding on all counts – The issues were referred to the Board with the union arguing the LMRC's decision was a settlement enforceable by a Board decision, and the employer stating the LMRC did not issue a decision but if it did, it could not and should not be enforced – The Board held that the actions of the LMRC did constitute a decision, the issue to be determined being its enforceability – The Board examined the language of the iterations of the collective agreement dating back to 1992 (when an LMRC decision was in dispute) and found significance in the changes in wording referring to "parties to the collective agreement" as opposed to "parties to the grievance" – The greater precision in identifying whose rights are at stake in the LMRC decision caused the Board to reject the union's preliminary motion that the decision was enforceable as a settlement – Matter continues

INDUSTRIAL REDI-WORKS INC.; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1916 381

Settlement – Employment Standards – Fraud – Twenty-three claimants had reached a settlement with one of three directors of SLMsoft Inc. – A term of the settlement released all three directors from any obligations, upon receipt of the entire payment by the director who signed the settlement – The payment was never made – The Board determined that the term of the settlement forfeiting the employees' entitlement to seek relief from directors only arose upon payment of the money – The Board also found that a director's purported letter of resignation was fraudulent and that it induced the claimants to enter into the settlement – Pursuant to s. 120(5) the claimants were entitled to an order voiding the settlement agreement on the basis of fraud – Matter re-listed for Hearing

SLM SOFT INC.; RE GOVIN MISIR, A DIRECTOR; RE EDDIE LAW, A DIRECTOR; DR. BUDHENDRANAUTH DOOBAY, A DIRECTOR; RE MURAT TAYFUN CAN ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS 422

Standing – Project Agreement – Sector Determination – The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board – The Canadian Union of Skilled Workers filed a sector determination, challenging the project agreement and arguing it falls within the electrical power systems sector, as opposed to the ICI sector – The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement – Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative – Application for sector determination dismissed

GREENFIELD ENERGY CENTRE LP AND BURNS AND ROE ENTERPRISES, INC.; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING

INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663 365

Status – Certification – Construction Industry – Trade Union – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION.. 412

Strike – *Ambulance Services Collective Bargaining Act, 2001* – Essential Services Agreement – Interest Arbitration – Lock-Out – The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course – The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement – The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" – Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out – Employer's application allowed; final and binding interest arbitration directed; union's application dismissed

SUN PARLOUR EMERGENCY SERVICES INCORPORATED (ESSEX DIVISION); RE SEIU, LOCAL 1.ON 447

Trade Union – Certification – Construction Industry – Status – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION.. 412

Trusteeship - Conflict of Interest - Judicial Review - In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 - The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" - In the Court's view, all the information held by the law firm related to the trusteeship and its litigation - Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent - Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" - Application for judicial review allowed

RICHARD WEISS AS TRUSTEE FOR LOCAL 183; RE ONTARIO LABOUR RELATIONS BOARD; RE ANTONIO DIONISIO AND JOHN DIAS........................... 466

Unfair Labour Practice - Certification - Practice and Procedure - Related Employer - Remedies - The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer - As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific - The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing - In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma - The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific - Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA.. 297

Voluntary Recognition - Bargaining Rights - Collective Agreement - Reference - Sale of Business - Bingo Press was sold to Arrow which was located in Niagara Falls - The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines - The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case - The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application - The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel - The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BINGO PRESS & SPECIALTY LIMITED/ARROW GAMES (BAZAAR & NOVELTY); RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 462 307

2358-06-R; 3135-06-U; 3134-06-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **1614818 Ontario Inc. c.o.b. as Postma Concrete Forming**, Responding Party v. Construction Workers Local 53 affiliated with Christian Labour Association of Canada, Intervenor: Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **1614818 Ontario Inc. c.o.b. as Postma Concrete Forming** and 675606 Ontario Limited c.o.b. as Specific Utility Contractors, Responding Parties v. Construction Workers Local 53 affiliated with Christian Labour Association of Canada, Intervenor.

Certification – Practice and Procedure – Related Employer – Remedies – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

BEFORE: *Mary Ellen Cummings*, Alternate Chair, and Board Members *John Tomlinson* and *Richard Baxter*.

APPEARANCES: *Stephen Krashinsky* and *Philip da Silva* for the applicant; *William McNaughton* and *R. Schenk* for the responding parties; *Elizabeth Forster, Brad Phillips, Chuck Wilson* and *Jason Manor* for the intervenor.

DECISION OF THE BOARD: March 21, 2007

1. These files consist of an application for certification in which the Labourers' International Union of North America, Ontario Provincial District Council ("the Labourers") seeks remedial certification, pursuant to section 11 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act") and an application seeking a declaration that 1614818 Ontario Inc. c.o.b. as Postma Concrete Forming ("Postma") and 675605 Ontario Limited c.o.b. as Specific Utility Contractors ("Specific") are a single employer for the purposes of the Act. The Labourers assert that Postma has committed unfair labour practices that ought to cause the Board to provide a series of remedies in addition to remedial certification and have filed an unfair labour practice complaint. The Labourers ask the Board to use its powers to make a declaration that Postma and Specific are a single employer and to declare that the bargaining rights held by Construction Workers Local 53 affiliated with Christian Labour Association of Canada ("CLAC") in respect of Specific be terminated.

2. Specific, Postma and CLAC brought a preliminary motion asking that the Board dismiss that portion of the pleadings, and specifically the single employer application, on the

basis that the Board lacks the jurisdiction to terminate CLAC's bargaining rights with Specific as a remedy for unfair labour practices allegedly committed by Postma.

3. All parties agreed that in determining whether the Labourers have made out a *prima facie* case that the Act has been breached and that it is entitled to the remedies it seeks, the Board must assume that all of the allegations made are proved.

4. CLAC holds bargaining rights with Specific, gained through a certificate issued by the Board on December 19, 2006. The Labourers ask the Board to terminate CLAC's bargaining rights with Specific as a remedy for the unfair labour practices committed by Postma. The Labourers allege that Postma has used its ability to control the employment opportunities available at Specific to threaten and intimidate employees of Postma. The Labourers also assert that Postma has communicated a preference for CLAC, with the result that the bargaining rights gained by CLAC at Specific would not have been possible but for the unlawful conduct of Postma.

5. We will set out the allegations in summary. Postma and Specific are operated by the same partners. Workers on the payroll of Postma are regularly sent to Specific to perform work and the employees depend on this ability to move back and forth for their economic security. In the days leading up to the representation vote for the employees of Postma, one of Postma's owners told employees that if they voted for the Labourers, they would no longer be able to move back and forth. He told employees that they could not be part of two unions but that if they supported CLAC instead of the Labourers they would get "the same or more" and the employer would get them "a union that works". One employee is particularly vulnerable because the nature of the work he performed at Postma makes him ill, and he needs to work at Specific. He was told that he would be classed as a formsetter and only able to work at Postma. The Labourers do not allege that CLAC engaged in any wrongdoing. The Labourers did not participate in CLAC's application for certification for Specific.

6. Prior to the representation vote at Postma, the employer told the employees there would be a Christmas party immediately after the vote, that employees would be paid for their time and would receive a bonus. The employees received bonuses.

7. The parties argued about whether the Board had jurisdiction to terminate bargaining rights of a union as a remedy for unfair labour practices committed against another union. The Board does not think it necessary or appropriate to determine the matter on the basis of jurisdiction. We will assume, without deciding, that the Board has the jurisdiction to terminate bargaining rights as a remedy for an unfair labour practice. However, we note that we are doubtful that the Board has such jurisdiction.

8. In any event, we think it is more appropriate to assess, on the basis of the pleaded facts, whether the Board would order the termination of CLAC's bargaining rights in all of the circumstances. Counsel for the Labourers urged us not to take such an approach. He argued that it would be more appropriate to wait until the case was heard, and we had a complete view of the facts, within their context, before foreclosing possible remedies.

9. In our view, it is more efficient to determine this issue at the outset. The Labourers' case is taken at its highest. We must assume it will prove all that it has alleged, so the Labourers

lose nothing by the Board taking an early view of the remedial possibilities. If the Board determined that it would not strip CLAC of its bargaining rights, it is quite likely that the application seeking a determination that Postma and Specific are a single employer would not be seriously pursued, because there is little to be gained by the Labourers. Unless the bargaining rights of CLAC are terminated, there is no "room" for the Labourers to acquire rights for Specific as a result of a single employer determination.

10. The Labourers argued that employer support for a trade union is unlawful conduct under the Act, so there must be a remedy. And when that employer support has put a union in a position to gain bargaining rights it would not otherwise have gained, those bargaining rights should be terminated. The union argued that, as urged in *Diamond Taxicab Association (Toronto Limited)Limited*, [1995] OLRB Rep. June 753 at ¶117, we should not shy away from considering the broadest possible range of remedies, even when granting them may not be problem free.

11. In our view, revoking the bargaining rights of a trade union as a remedy for an unfair labour practice would be an extremely severe remedy, to be considered only in the most serious of cases of wrongdoing by a union. But in this case, the Labourers are asking us to revoke the bargaining rights of CLAC in the absence of any suggestion of wrongdoing by that trade union. Taking the Labourers' case at its highest, CLAC is the innocent beneficiary of wrongdoing committed by Postma and Specific.

12. In *Cabral Foods Inc.*, [1985] OLRB Rep. Feb. 165, the Board said what is now section 15 of the Act, the prohibition against the certification of a trade union that has received improper employer support, was intended to prevent the certification of unions that were not qualified to act on behalf of employees because of their inappropriate relationship with the employer. To deny certification (or in this case to revoke it) where the union was the innocent beneficiary of the employer wrongdoing would risk encouraging employers to interfere to foil the certification applications. We agree.

13. The Board, through section 96 of the Act, enjoys broad remedial powers to redress unlawful conduct. Indeed, in this case, the Labourers have asked for remedial certification of Postma as a remedy for its alleged unlawful conduct. That remedy, if ordered, would be a strong message to Postma and other employers about the consequences of serious interference in employees' right to participate in the lawful activities of trade unions. It would not be appropriate, on the material facts alleged in this case, to go a step further, and disrupt the bargaining rights of a union who is not alleged to have engaged in any wrongdoing. That would be an excessive and, in our view, unfair exercise of our remedial discretion.

14. We make the preliminary determination that we would not exercise our discretion and order the termination of the bargaining rights held by CLAC with Specific.

15. The Labourers must advise the Board and the other parties within 30 days of the date of this decision whether they intend to continue with the application in Board File 3134-06-R seeking a declaration that Specific and Utility are a single employer.

16. These matters are referred to the Manager, Field Services to continue settlement efforts.

17. This panel is not seized.

1884-06-R United Brotherhood of Carpenters and Joiners of America, Local 93, Applicant v. **ACTT Installation Ltd.**, Responding Party.

Certification – Construction Industry – Employer – The Board had to determine the identity of the employer in this application for certification – Wallworks obtained a contract to install fabric wall panels - ACTT bid on the installation of the panels at the behest of Wallworks, but was not awarded the contract because the work had to be performed by a union sub-contractor – Wallworks retained the services of Fabric Interior, who hired T, the president of ACTT to train and supervise the work – T invoiced Fabric on an hourly basis for his time, and for the ACTT equipment used on the project – T contacted the hiring hall and supervised the employees for the duration of the project – Employee cheques were paid by Fabric, and ROEs were issued by Wallworks - The Board found, applying the criteria from *York Condominium*, that the fundamental control over the employees was held by ACTT, so it was their employer – Certification granted

BEFORE: *Marilyn Silverman*, Vice-Chair.

APPEARANCES: *Jesse M. Nyman, Franklin DaSilva* and *Clay Wright* for the applicant; *Walter T. Langley* and *Mike Trevail* for the responding party.

DECISION OF THE BOARD: March 9, 2007

1. This is an application for certification filed under section 128.1 of the *Labour Relations Act, 1995* (the "Act") in which the applicant seeks certification on the basis of membership evidence filed.

2. There is one issue in dispute between the parties. That is, who is the employer of the four carpenters who are the subject of the application. ACTT Installations Ltd. ("ACTT or the responding party") asserts that it was not the employer and that the real employer was a company called Fabric Interior Finishing Ltd. ("Fabric Interior"). The union says that ACTT was the employer of the individuals.

3. Most of the facts are not in dispute. The parties agreed to have the evidence of Clay Wright represent the four carpenters who worked on the application date. Mr. Wright is a journeyman carpenter and a member of the applicant union.

4. The other witnesses called by ACTT were its owner and president, Michael Trevail and Renee Gratton, the manufacturing representative for another company, GWP Wallworks Group Inc. ("Wallworks") whose involvement in this case is described below. Ms. Gratton and Mr. Trevail live together.

5. All of the witnesses gave their evidence in a forthright and honest manner, consistently on the material facts.

6. Michael Trevail is president and owner of ACTT, which is in the business of installation of architectural products including acoustic wall panels. Mr. Trevail has operated ACTT for the last 18 years.

7. In December of 2005, ACTT tendered a quote on a building on Preston Street in Ottawa called the Adobe building ("the Adobe project"). He was asked to do this by Wallworks who had been retained to install fabric wall panels at the Adobe project. Wallworks had obtained the contract to supply and install the panels.

8. ACTT is the exclusive installer for Wallworks products in Ottawa and has done their work for 7 years. It is the only installer trained to do this type of installation in Ottawa.

9. Mr. Trevail submitted a square footage quote for the Adobe project. ACTT did not obtain the work because Wallworks learned that the work had to be done by a union subcontractor.

10. In July 2006, Mr. Trevail needed unionized workers to work on a project at the Royal Ottawa Hospital. He contacted Vic Quintal of Local 2041 of the Carpenter's union. According to Mr. Trevail, although Mr. Quintal was from the drywallers union ("Local 2041"), the men sent over to do the work at the Royal Ottawa Hospital were sent from Local 93, the applicant union. The responding party asserts that the applicant knew that the arrangement was that ACTT was not the employer of the men referred.

11. Meanwhile, Wallworks required unionized workers for the Adobe project. Wallworks retained the services of Fabric Interior, a unionized subcontractor to perform the installation at the Adobe project. At that time there were no men available in Ottawa trained to do the installation required at the Adobe project. Fabric Interior then hired Mr. Trevail to train and supervise the unionized workers at the Adobe project.

12. The work at the Adobe project began on August 24, 2006.

13. The first person whom Mr. Trevail brought to work on the project was Mr. Wright, the representative witness in this case. At the time, Mr. Wright had been working at the Royal Ottawa Hospital. He had been referred to the Royal Ottawa Hospital through the applicant's hiring hall by referral dated August 4, 2006 and as described in paragraph 10 above.

14. On August 24, 2006, Mr. Trevail told Mr. Wright to leave the Royal Ottawa Hospital and attend work at the Adobe project. Mr. Trevail then spent two days training Mr. Wright for the work required at the Adobe project. After Mr. Wright was trained, he trained another employee, Patrick Ramsay. Two more employees were hired to assist.

15. Mr. Trevail invoiced Fabric Interior on an hourly basis of $45.00 per hour for the supervisory and training work he provided. He also provided the use of ACTT equipment at the project and invoiced Fabric Interior for its use.

16. There is no dispute that the men were referred to work by Local 93, that the call to the hiring hall came from Mr. Trevail, and that the referral slips all bore the name of the contractor as Fabric Interior.

17. None of the paperwork associated with these men at the Adobe project was prepared by or signed by ACTT or Mr. Trevail. The cheques were signed by Fabric Interior, and it was either that entity or Wallworks that prepared and signed documents relating to dues, remittance forms, WSIB forms, Records of Employment, and anything else associated with employment. The hours were paid based on the information provided by Mr. Trevail. Paycheques were sent to the hiring hall for distribution.

18. The application for certification was filed on September 21, 2006.

19. There is no dispute that the day to day supervision and direction of the men on the Adobe project was done by Mr. Trevail. He arranged and approved overtime, dealt with the men when they requested a schedule change from a five day to a four day work week, dealt with issues arising on the site, oversaw the quality of the work, called the hall for men, and decided who would be retained at the end of the job to work on deficiencies. Mr. Trevail decided what the employees would do and when. The only person whom the employees dealt with on the Adobe project was Mr. Trevail.

20. Mr. Trevail says that he did not make the decisions in respect of this work without speaking to "Calgary" first (a reference to Wallworks based in Calgary). He asked Calgary about the overtime, the schedule change and the replacement of men when needed from the hiring hall. Mr. Trevail concedes that this direction from Calgary was done verbally until the application for certification was filed, after this communication proceeded more formally through emails and faxes.

21. Ms. Gratton says that Mr.Trevail was hired as a working or training foreman by Wallworks so that men would be trained in Ottawa to perform this installation. In that way, Wallworks would not be required to have men from Calgary and Toronto brought in to a union job at increased cost. Local carpenters would be trained in the work required.

22. Ms. Gratton confirmed Mr. Trevail's evidence that even for a small decision on spending, she as the agent of Wallworks could make the decision but Mr. Trevail could not. An example of this was provided in relation to a $300.00 expenditure that was documented at the end of the project; approval for which could not be given by Mr. Trevail.

23. Mr. Wright referred to one occasion when there was an error on his paycheque which was corrected after he brought it to Mr. Trevail's attention. Mr. Wright was sent from the Royal Ottawa Hospital job, to the Adobe project at the outset of the Adobe project by Mr. Trevail, and during the Adobe project he was instructed by Mr. Trevail to attend back at the Royal Ottawa Hospital on one day and then back to perform work that day at the Adobe project.

24. Mr. Wright confirmed that on at least one occasion, November 3, 2006, he heard Mr. Trevail on the phone to Calgary obtaining authorization for the men to work overtime. He said that there were other times these authorizations were required for overtime as well.

25. There was no discipline on the job and men were laid off when it was finished.

26. Mr. Wright did express some understandable confusion as to who his employer was. Mr. Trevail supervised the work, the cheques were from Fabric Interior, and Wallworks issued

him Records of Employment. During one conversation, which occurred after the notice of application for certification was posted, Mr. Trevail told Mr. Wright that Mr. Trevail was not the employer of the men on the Adobe project. Mr. Wright did not press it, as it was not unusual in his view, for there to be a number of corporate entities involved on a construction project.

27. Mr. Trevail has managed union workers for another company before in this type of arrangement. He concedes that the purpose of the arrangement was to be able to use union workers as the project required, but for ACTT to remain a non-union company. Mr. Trevail said that he did not want to do this job if it would risk his becoming unionized. Since in his view he was not the employer on the Adobe project, he felt that there was no risk.

28. The parties relied on the decision in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645 and the factors listed their as the basis for how the Board deals with cases that require it to determine who is the employer. These are:

> (1) The party exercising direction and control over the employees performing the work.
>
> (2) The party bearing the burden of remuneration.
>
> (3) The party imposing the discipline.
>
> (4) The party hiring the employees.
>
> (5) The party with the authority to dismiss the employees.
>
> (6) The party who is perceived to be the employer by the employees.
>
> (7) The existence of an intention to create the relationship of employer and employees.

29. The responding party concedes that the direction and control over the work was done by Mr. Trevail, although it says there was little of it other than training. It contends that he was a supervisor, and not the employer. The responding party seeks to minimize the impact of Mr. Trevail's day to day supervisory functions.

30. The responding party argues that the union was complicit in the way this job was arranged and references its discussions with Local 2041 of the applicant union. I find that there was nothing said or done that approaches any kind of assurance upon which the responding party should have relied as a defence to an application for certification. It is not a factor in any event that would be taken into consideration in an analysis of who is the employer.

31. The union concedes that the burden of remuneration fell on Wallworks or Fabric Interior, but argues this is not fatal to its application.

32. It is clear that no discipline was meted out during this project.

33. The hiring was done in name by Fabric Interior, but in fact by Mr. Trevail as he called the hall for men.

34. The union says that Mr. Trevail did dismiss employees at the end of the job but the responding party says that in fact, what really occurred, was that the work came to an end and employees were laid off in the usual course.

35. The responding party asserts that Mr. Wright understood and conceded that ACTT was not his employer, and that clearly Mr. Trevail had no intention to create the relationship of employer-employee and that his intention was clearly quite the opposite.

36. The parties relied on various authorities in support of their positions. The responding party relied on the decision in *Lantic Sugar Ltd.*, [2004] OLRB Rep. Jan./Feb. 69, for the proposition that daily direction and control, depending on the circumstances, can be found to be insufficient to identify the employer. The responding party argues that the Board should not determine this case on the day-to-day control over the employees, as that is only one factor to be considered. It asserts that this case should be determined in the context in which is occurred.

37. The union relied upon cases decided in the construction industry for the proposition that the main focus in this determination is who exercises fundamental control over the employees. (See, *International Union of Painters and Allied Trades, Local Union 1819 v. Regal Aluminum Systems Inc.*, 2006 CanLII 29094 (ON L.R.B.); *Labourers' International Union of North America, Local 1036 v. D and B Masonry*, 2005 CanLII 1741 (ON L.R.B.); *United Brotherhood of Carpenters and Joiners of America, Local 2486 v. Gorf Contracting Ltd.*, 2005 CanLII 3069 (ON L.R.B.); and, *International Brotherhood of Electrical Workers, Local 586 v. Vrana*, 2005 CanLII 2007 (ON L.R.B.))

38. The Board often cites the factors in *York Condominium Corporation*. While each of the factors it mentions is worthy of consideration (with less emphasis on the last two) they all are manifestations of the first factor which is ultimately decisive. In other words, all of the subsidiary factors are reflective of the fundamental importance of the determination of who exercises direction and control over the work. It is the distillation of the other ancillary factors. This is because fundamental control over the work is the key consideration in the employment relationship. As the Board stated in *Sutton Place Hotel*, [1980] O.L.R.B. Rep. Oct. 1538:

> The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of the Labor [sic] Relations Act.

39. In this case, the four individuals who are the subject of the application were in contact with only one person during their employment at the Adobe project and that was Mr. Trevail of ACTT. It does not assist the responding party that all the superficial indicia of control (payroll and paperwork) rested with the other corporate entities, being Wallworks and Fabric Interior. As the Board stated in Esso Imperial Oil Limited ("Esso") *533670 Ontario Ltd. (c.o.b. Best Personnel Services("Best"))*, [1997] OLRB Rep. Sept./Oct.849, …"the Board will not permit commercial form to obscure labour relations realities".

40. The reality of the Adobe project was that the four individuals were supervised by Mr. Trevail. He directed and controlled every aspect of their work. The evidence makes it clear

that these men were experienced workers who were instructed what to do and undertook the work with skill and efficiency. But to the extent that there were managerial decisions to make, Mr. Trevail did so. He called the hall for men, trained Mr. Wright on the work, oversaw the quality of the work, attended at the work site, instructed the men as to what to do, dealt with whatever issues arose including overtime, changes in work schedule and paycheque corrections. He also provided the equipment for the project. This is the role of an employer.

41. On the issue of his having to obtain instruction from Calgary (Wallworks) I find that that aspect of the case was emphasized or magnified after the date of application and had a self serving component to it. In any event it obscures the real issue of who the employer is. Even if Mr. Trevail had to obtain authorization or permission, it is clear given his managerial presence on the job, that his input and decisions on what would and should be done would likely prevail.

42. The company asserts that Fabric Interior is the employer. It does not advance the position that Wallworks was the employer. It is clear that that company did nothing other than issue pay cheques and other paperwork. Its involvement with the Adobe project was simply as paymaster. The real question then is whether: (1) the employer is Wallworks and Mr. Trevail simply its project manager or supervisor or (2) ACTT was the real employer.

43. ACTT bid on the Adobe job and it was conceded that the only reason that the company did not obtain the work was that union labour was required. ACTT is the only company that can do and does Wallworks' installations of this type. It seems from the evidence that Mr. Trevail simply converted his bid to an hourly rate plus rental equipment use so as to conform to the requirement that union labour be used. The conversion from bid to hourly was not for any other commercial purpose. The person on site who knew what was doing and to whom Wallworks must have looked for direction in its decision making was Mr. Trevail. Mr. Trevail operated other jobs with ACTT simultaneously with the Adobe project. Mr. Trevail said that he did not want to do the Adobe job if there was a risk of ACTT becoming union.

44. Mr. Trevail came and went at the Adobe project when he determined that he should. If he was at the site for one hour or less, he charged Wallworks for one hour. When he attended at the site was in his discretion. In that regard, he conceded there was a profit and loss issue for him in managing the job.

45. Fabric Interior, the purported employer, had no contact with the men. The fact that they were the entity that signed the cheques is not sufficient to make them the employer. They were simply the paymaster included to provide a union presence. Mr. Trevail and ACTT were who Wallworks worked with exclusively; Mr. Trevail was the person who could train the unionized workforce in this type of work. As the owner and president of ACTT he is indistinguishable from and in relation to the men at the Adobe project. Mr. Trevail, and therefore ACTT, was the employer.

46. Having regard to the reasons described herein, I am satisfied that the four carpenters employed at the Adobe project on the date of application for certification, were employed by ACTT.

47. On the basis of the information provided in the application, including the information and membership evidence filed by the applicant, the information provided under subsection

128.1(3) of the Act, the agreements reached by the parties, and the evidence before me, I am satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant on the date the application was filed.

48. The applicant has asked that it be certified pursuant to section 128.1(13)(a) relying solely on the number of persons in the bargaining unit who are its members. The applicant is entitled to do so under section 128.1.

49. The Board is satisfied that it should certify the applicant.

50. Section 128.1(24) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> **128.1** (24) If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126,
>
> ...
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13)(a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas;
>
> ...

51. Therefore, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America in respect of all carpenters and carpenters' apprentices in the employ of ACTT Installation Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

52. Further, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of ACTT Installation Ltd. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

53. The employer is directed to post copies of this decision immediately. These copies must remain posted for thirty days following the date of this decision in a location or locations in the workplace where they are most likely to come to the attention of all employees affected by the application.

0181-06-M; 3228-05-R National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) and its Local 462, Applicant v. **Bingo Press & Specialty Limited / Arrow Games (Bazaar & Novelty)**, Responding Party; National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. **Bingo Press & Specialty Limited operating as Bazaar Novelty (Bingo Press) and Arrow Games Corporation (Arrow Games)**, Responding Parties.

Bargaining Rights – Collective Agreement – Reference – Sale of Business – Voluntary Recognition – Bingo Press was sold to Arrow which was located in Niagara Falls – The union's collective agreement with Bingo Press was limited in geographic scope to St. Catherines – The employer asked the Board to dismiss the union's sale of business application for failing to plead a *prima facie* case – The Board's determination of the motion would decide the Ministerial reference (whether the minister had the authority to appoint a conciliation officer) and accordingly the reference was joined with the sale of business application – The union took the position that its bargaining rights arose from an oral voluntary recognition agreement or from estoppel – The Board found that the bargaining rights and collective agreement transferred to Arrow and the only issue was whether the collective agreement applied to Arrow's operation in Niagara Falls – The Board found that only collective agreements transfer on the sale of business, not oral amendments to scope clauses or oral voluntary recognition agreements – The Board found that the estoppel argument failed for two reasons: first there was no clear promise or representation made by Bingo Press and second, there was no detrimental reliance – Accordingly the union's sale of business application was dismissed for failing to prove a *prima facie* case and the Board's advice to the Minister was that he did not have the authority to appoint a conciliation officer – Application dismissed and advice given

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Barry Wadsworth* for the applicant; no one appearing for Bingo Press & Speciality Limited; *Lee Shouldice* and others for Arrow Games.

DECISION OF THE BOARD: April 17, 2007

1. Board File No. 0181-06-M is a reference by the Minister of Labour to the Board pursuant to section 115 of the *Labour Relations Act, 1995* (the "Act"). The Minister asks the Board whether he has the authority to appoint a conciliation officer in the circumstances which exist between these parties.

2. Board File No. 3228-05-R is an application under section 69 of the Act. Arrow Games seeks to have the Board dismiss that application without a hearing for an alleged failure to plead a *prima facie* case for the relief claimed. The relief claimed is a declaration "that a sale of business within the meaning of s.69 of the Act has occurred with respect to the operations of Bingo Press located at Niagara Falls, ON, and, as such, Arrow Games is bound to the Collective Agreement in existence between CAW-Canada and Bingo Press as at October 4, 2005, with respect to that location". The applicant Union asserts that a declaration is warranted in all of the

circumstances. A decision on the employer's motion will answer the Minister's questions. It is therefore appropriate to have these matters determined together.

3. Bingo Press did not file a detailed factual response to the application and declined to participate as it has made an assignment into bankruptcy.

4. The Board held a hearing on November 22, 2006 to receive the arguments of the parties with respect to these issues in these matters.

5. For the purposes of the *prima facie* motion, the Board accepts the facts pleaded by the union in its application and submissions as being true and provable. Those facts are as follows:

> The CAW-Canada and Bingo Press and Specialty Limited (carrying on business as Bazaar & Novelty) ("Bingo Press") are parties to a collective agreement effective during the period April 1, 2003 to March 31, 2006. The prior collective agreement between these parties ran from April 15, 2000 to March 31, 2003. Article 2.01 of the Collective Agreement states that Bingo Press & Specialty Limited recognizes the "CAW-Canada and its Local 462 as the bargaining agent with respect to rates of pay, hours of work and other conditions of employment for its employees in the City of St. Catharines, Ontario save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, Electronic Service Technicians, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and security guards."
>
> Until recently, Bingo Press was a wholly-owned subsidiary of Western Bingo Supplies Inc. ("Western Bingo"), a corporation existing under the laws of the State of California. Western Bingo is a wholly-owned subsidiary of BK Entertainment, Inc. ("BK"), a corporation existing under the laws of the State of Delaware. Bingo Press is the 100% owner of Bingo Vezina Inc., a corporation existing under the laws of Canada. Bingo Press is also a 13% owner of Bingo Country Holdings Limited, a corporation existing under the laws of the Province of Ontario.
>
> Bingo Press manufactured and distributed bingo paper and related products throughout Canada. Until its recent financial troubles Bingo Press operated from the following locations:

Location	**Purpose**
Richmond,	BC Finishing and Distribution
St. Catharines, ON	Printing, Finishing and Warehousing of Bingo Paper and Pull-Tabs; Distribution to customers; Customer Service; Corporate Head Office
St. Catharines, ON (Building C)	Manufacture Ink Dabbers; Bingo Hall Equipment Repair
London, ON	Subleased
Dieppe, NB	Sales Office, Warehouse and Minimal Distribution
Cape Breton, NS	Sales Office

Lower Sackville.	Finishing, Sales Office, Warehouse, Distribution
Edmonton, AB (6912 – 76th Ave.)	Retail Store
Calgary, AB	Warehouse and Distribution
Edmonton, AB (9605 45th Ave.)	Warehouse and Distribution
Winnipeg, MB	Retail and Ink Distribution

Bingo Press had three main product lines:

a. Bingo Paper. Bingo Press sells a complete line of bingo paper which is generally sold in booklet form and is available in a variety of sizes, styles and colours. Bingo Press's bingo paper line includes a number of specialty bingo games under proprietary trademarks or licenses. Bingo Press also sells a line of disposable cards designed for play on tour buses, cruise ships, and other environments with limited space in which to play.

b. Ink dabblers. Bingo Press manufacturers ink dabbers used to mark called numbers on paper bingo sheets. Bingo Press sells a varied line of ink colours, bottle styles and sizes. Bingo Press pioneered the use of decorative and innovative labels on ink dabblers, for seasonal items like Christmas and Halloween dabbers and for customized labels for bingo halls and distributors.

c. Pull Tab Tickets. Bingo Press manufactures and sells pull tab tickets, which are also referred to as break open tickets, lucky 7 tickets, instant bingo tickets and Nevada tickets. Each set of tickets sold contains a pre-determined number of winning tickets. A typical pull tab ticket has a prize structure that varies from approximately 60% to 85% of the gross receipts being paid out as prizes to the players. The remaining percentage of the gross receipts is used to cover the cost of the product and expenses and to prove fundraising dollars or revenues to the sponsoring organization.

Bingo Press's base of approximately 1,400 active customers ranges from small church bingo halls operating weekly, to commercial bingo businesses operating 24 hours a day, to provincial lottery corporations.

As of March 1, 2005, Bingo Press employed 678 individuals in Canada with the majority being based in St. Catharines, Ontario at the main production facility. At this facility there were 467 active employees that are members of the CAW Local.

CCAA RESTRUCTURING

Due to a number of factors, including the introduction of government sponsored casino's, new anti-smoking legislation and the high Canadian dollar, Bingo Press' revenues had been reducing during the past several years. In early 2005, Bingo Press concluded that it was insolvent. On March 11, 2005, Bingo Press applied to the Ontario Superior Court of Justice seeking protection from its creditors under the *Companies' Creditors Arrangement Act*, ("CCAA") in order to have time to address its precarious financial situation and to formulate a plan of arrangement for presentation to its creditors.

Under the order granted to it on March 16, 2005, all proceedings against it were stayed, including future proceedings that may have been taken, except for those where a prohibition on stays exists under the CCAA. As such, Bingo Press was permitted to repudiate leases of property, fail to make payments on debts and terminate the employment of employees without payment of statutory notice and severance pay, all without fear of being required to defend proceedings brought against it, until such time as the Court lifted the stay of proceedings.

Bingo Press initially provided working notice of termination to 323 union and 88 non-union employees in Ontario with termination dates ranging between April 8, 2005 and October 28, 2005. However, sales did not decline as much as initially anticipated and Bingo Press rescinded a number of the notices. Bingo Press finally terminated the employment of 233 union and 74 non-union employees in Ontario. With respect to employees employed in locations outside of Ontario, the employment of 51 employees was terminated by May 2005 with an additional 13 by June 30, 2005.

As part of its restructuring, Bingo Press took the following steps:

1. It sold its operations in Alberta, New Brunswick, Nova Scotia and Prince Edward Island.
2. It has ceased its manufacturing operations in British Columbia.

At its St. Catherine's facility, Bingo Press found that it had significantly greater production space than it required. However, the property owner refused to depart from the original lease terms. Therefore, Bingo Press sought to consolidate its operations and entered into a lease for a 28,000 square foot facility in Niagara Falls. The pull-tab production together with Bingo Press's art department, game development division and part of the customer service department were relocated to this facility. Bingo Press also entered into a lease for a 47,300 square food facility in Niagara Falls and expected to relocate its bingo paper and ink manufacturing divisions to this facility. It would appear, however, that Bingo Press ran out of funding to accomplish this second relocation.

SALE OF BINGO PRESS AS A GOING CONCERN

In or about June 2005, Bingo Press made a decision to sell its operations as a going concern. For that reason, Bingo Press underwent a marketing process to identify and approach potential purchasers for part or all its business and operations. The equipment of Bingo Press was virtually worthless to potential purchasers outside of the bingo industry, having been customized to meet the needs of a bingo printing type operation.

Further, given that the consumable bingo product industry is strictly regulated, the customized Bingo Press equipment could only be used by another entity which was licensed to manufacture and sell gaming products. Consequently, there were only five (5) possible purchasers of Bingo as a going concern.

In June 2005, Bingo Press began discussions with Arrow Games International ("Arrow"), among others, with respect to an en bloc sale of most or all of its remaining operating assets and business. During the negotiations it was Bingo Press' stated position that under any agreement Arrow was to assume certain of Bingo Press' leased locations, continue to supply its customers, offer employment to a number of people, and recognize the status of the CAW.

On July 22nd, 2005, Arrow presented terms for discussion to Bingo Press regarding a transaction to purchase its operations as a going concern. From July 22nd, 2005 to October 5th, 2005, Bingo Press and Arrow engaged in negotiations regarding the terms and conditions pursuant to which Arrow would agree to purchase the business and assets of Bingo Press. On October 5th, 2005, Bingo Press and Arrow entered into the Asset Purchase Agreement.

Pursuant to the Asset Purchase Agreement, Arrow is to continue the business and operations of Bingo Press as a going concern in Niagara Falls, Quebec and British Columbia. Specifically, Arrow is to assume (or negotiate new) leases for each of Bingo Press's Quebec, Niagara Falls and British Columbia facilities. The only leases that Arrow would not be assuming were (i) the lease in St. Catharines and, (ii) the lease for the Thorold Stone Road premises in Niagara Falls, which was entered into by Bingo Press subsequent to its filing for protection in these proceedings, in anticipation of moving its bingo paper operations, which it no longer has the funds to complete.

Mr. John Gallagher Jr., President of Arrow, advised Bingo Press that Arrow intended to hire approximately one hundred (100) of Bingo Press's employees in Ontario. He further advised that a significant number of additional jobs would be created in Arrow's Brantford finishing facility as a result of Arrow assuming many of Bingo Press's customers. In addition, Gallagher advised that Arrow would offer employment to substantially all of the twenty-eight (28) Bingo Vezina employees in Quebec and the three (3) Bingo Press employees in British Columbia.
As part of the deal, Bingo Press was required to negotiate and facilitate the execution by all such parties and employees of all necessary collateral agreements regarding non-competition covenants.

As a result of the transactions in the Asset Purchase Agreement:

a) the majority of Bingo Press's current business and operations were assumed by Arrow;
b) a significant number of its remaining employees were retained by Arrow;
c) there was minimal disruption for Bingo Press's customers;
d) Bingo Press's suppliers benefited by having the opportunity to supply Arrow's increased need for raw materials, products and services;
e) There was minimal disruption in the market.

Subsequent to completion of the sale, Bingo Press has endevoured to liquidate its inventory on hand and collect its accounts receivable. Theses actions are being facilitated by arrangements made with Arrow pursuant to the Sale.

The final terms of sale have not been released as they are under Court seal awaiting the filing of the CCAA Monitor's certificates relating to the sale of Bingo Press' assets and operations.

RECOGNITION OF CAW-CANADA AT NIAGARA FALLS SITE

On April 18, 2005, at a Union/Company meeting subsequent to the CCAA filing, the parties discussed the potential relocation of the pull tab (Nevada Ticket) production to the new Niagara Falls location as part of reducing Bingo Press' property leasing costs. Mr. Rob McNeill, Bingo Press's then Operations Manager, stated that he expected that Bingo Press would continue to recognize the Union if a move was made to the new location.

On May 6, 2005, Bingo Press advised the CAW-Canada of the relocation plans to the new Niagara Falls location. Bingo Press advised that it would put up notices advising those employees who wished to transfer to jobs at the new location to sign up. It was expected that employees would normally move to the new facility with the same jobs that they were performing at St. Catherine's. Bingo Press again confirmed that it would recognize the CAW-Canada bargaining rights at the new location.

On July 13, 2005, the Union forwarded an email to Ms. Tracy Lee, Bingo Press' Human Resource manager informing Bingo Press that the Union would be sending a draft memorandum with respect to the Union's proposed recognition agreement for Bingo Press's Niagara Falls location. On July 19, 2005, the Union sent a follow up email – with a proposed amendment to article 2.01 of collective agreement regarding the scope clause being changed to "Regional Municipality of Niagara" from "City of St. Catharine's."

At an August 15, 2005 Union/Company meeting, Mr. McNeill indicated that Bingo Press did not wish to sign the proposed amendment to article 2.01 as it did not want to "open the contract." However, Bingo Press confirmed ongoing recognition of the CAW-Canada at the Niagara Falls plant. Further, Mr. McNeill stated that he had been advised by their lawyer (Brent Forman) that *defacto* recognition was in place as Bingo Press continued to deduct Union dues from employees located at the Niagara Falls facility.

During the entire period that Bingo Press operated the Niagara Falls facility it managed the employees located there in accordance with the terms of the collective agreement, including the application of seniority, rates of pay, vacation, the grievance procedure, etc.

On October 12, 2005, Mr. McNeill stated that he was unaware of what Arrow Games' position was regarding the status of the CAW-Canada agreement with Bingo Press vis-à-vis the Niagara Falls location. Mr. McNeill advised that he would contact Bingo Press' upper management and have them contact the Union. No such contact occurred, however, Mr. McNeill verbally advised employees at a plant meeting on October 12, 2005, that the employees could transfer and work at Niagara Falls by seniority. Mr. McNeill posted a sign up sheet in the St. Catharine's plant for that purpose.

Also on October 18, 2005, Mr. McNeill provided the name of a contact person at Arrow Games. The Union left messages for that individual on two occasions, but there was no response to the Union's efforts. On November 10, 2005, the CAW-Canada forwarded to Arrow Games, at the Niagara Falls Location, a number of unresolved grievances. On November 21, 2005, Arrow Games advised that it was not the employer and that it would not be responding to the grievances which had been forwarded to it by the CAW-Canada.

> In all respects, both Arrow Games and Bingo Press are representing themselves to be one and the same entity.

6. On March 30, 2006, the Union requested the appointment of a conciliation officer pursuant to section 18 of the Act. The collective agreement was to expire on March 31, 2006.

7. By letter dated April 3, 2006, Arrow objected to the appointment of a conciliation officer because, it asserted in writing, "the CAW does not have bargaining rights with respect to Arrow Games at all in Niagara Falls, Ontario because the collective agreement in question which provides the CAW with bargaining rights "is limited in geographic scope to St. Catharines, Ontario."

8. By letter dated April 3, 2006, the office of Labour Management Services wrote to the Union inviting it to respond to Arrow's letter.

9. By letter dated April 13, 2006, the Union responded by maintaining that it does have bargaining rights "with respect to employees of Bazaar & Novelty in Niagara Falls, Ontario". However, the Union believes that "the fact that a collective agreement exists" is enough for a conciliation officer to be appointed. The Union submitted it had taken the necessary steps to enforce (its) rights in accordance with this agreement so that the Minister of Labour should appoint a Conciliation Officer notwithstanding the section-69 application.

10. By letter dated April 17, 2006, Arrow asserted that "until [the CAW's] claim that it enjoys bargaining rights at [the Niagara Falls] facility is determined by the Labour Relations Board, the CAW does not represent anyone in their employment by Arrow Games at its operations in Niagara Falls."

11. The Minister advised the Board that he is of the opinion that the circumstances surrounding the request by the Union raise questions as to his authority to appoint a conciliation officer. Accordingly, he referred the following questions to the Board for its advice:

> 1. Does the Minister of Labour have the authority to appoint a conciliation officer?
>
> 2. If so, what are the geographical boundaries of the bargaining unit for which such an appointment can be made?

Decision

12. Under s. 69 bargaining rights are transferred to a purchaser on a sale of business in two circumstances: under s.69(2) where a union is bound by or a party to a collective agreement with the seller of the business or; under s.69(3) where the union did or could give notice to bargain under s. 16 and 59 of the Act. In this case the union appears to rely only on s.69(2): it asserts that it is a party to a collective agreement with Bingo Press (and after the sale, with Arrow) which covers the Niagara Falls operation. Since it asserts that there is a collective agreement in place, and the sale took place prior to the last three months of that collective agreement, it does not rely on s.69(3).

13. The CAW has two alternative arguments each of which, in its view, result in the application of s.69(2). The first is that Bingo Press voluntarily recognized the Union in Niagara Falls and that Arrow is bound by that recognition. The second is that Bingo Press would have been estopped from arguing that it was not bound to the collective agreement in Niagara Falls and Arrow is in the same position as Bingo Press following the sale.

14. Arrow argues that since the scope clause of the St. Catharines collective agreement does not cover Niagara Falls the remedy sought by the Union – bargaining rights *vis a vis* Arrow's operations in Niagara Falls – cannot be awarded by the Board in the s.69 application. Enforceable voluntary recognition agreements must be in writing and there is no written recognition agreement for Niagara Falls between Bingo Press or Arrow and the Union. In addition, there is no estoppel created in the facts of this case.

15. The starting point of the analysis must be a recognition that bargaining rights and the collective agreement did transfer to Arrow on the sale of the business. The only issue is whether that collective agreement applies to Arrow's operation in Niagara Falls. I note that there is no dispute that I have the jurisdiction to determine this issue and must do so in order to answer the question posed by the Minister.

16. I consider first the argument that Bingo Press voluntarily recognized the applicant in Niagara Falls and that Arrow is bound by that on the sale of the business.

17. There is no allegation of a written/signed voluntary recognition agreement. There is even some doubt on the facts alleged that Bingo Press orally recognized the CAW (as opposed to applying the collective agreement). However, I assume for the purposes of this decision that the CAW can prove that Bingo Press orally committed to recognize the Union's bargaining rights with respect its Niagara Falls operations.

18. Do "bargaining rights" obtained through verbal voluntary recognition transfer on the sale of a business. For the following reasons, I find that they do not.

19. First of all, it is only collective agreements which transfer on the sale of a business. That is because under s.69(2) the purchaser is "bound by the collective agreement as if the person had been a party thereto". Since collective agreements must be in writing under the Act (see s.1(1)), in the absence of an estoppel, oral amendments to the scope clause (as here) would not form part of the collective agreement to which the purchaser becomes a party.

20. Second, in my view the Act does not give effect to oral voluntary recognition agreements. In order to be enforceable, voluntary recognition agreements must be in writing. This conclusion was discussed by the Board in *Universal Concerts Canada* [1997] O.L.R.D. No. 2188 (July 2, 1997) Board File No. 0637-96-R in analysis which I adopt:

> 24. "Voluntary recognition agreement" is not a defined term in the *Labour Relations Act, 1995*, although section 16 establishes the right of a union to commence collective bargaining based on a voluntary recognition:
>
> > 16. Following certification or the voluntary recognition by the employer of the trade union as bargaining agent for the employees in the bargaining unit, the

> trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.
>
> 25. On the other hand, there are several references in the Act to an "agreement" whereby the employer recognizes the trade union as the bargaining agent of employees, and the effect of that agreement. For instance, the Act provides:
>
> > 7. (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement and the Board has not made a declaration under section 66, another trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the recognition agreement only after the expiration of one year from the date that the recognition agreement was entered into.
> >
> > 18. (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> 26. It was not suggested by the parties that the type of agreement referred to in sections 7(3) and 18(3) is anything different from the voluntary recognition referred to in section 16, and indeed, the Board's cases (see for instance, the cases in the construction industry) generally adopt the requirements set out in sections 7(3) and 18(3) in determining whether parties are bound to a voluntary recognition.
>
> 27. Having regard to the above we accept that an agreement which establishes bargaining rights enforceable through the Act must be in writing and must signify the recognition by an employer of a trade union as the exclusive bargaining agent of a unit of its employees.

21. Labour relations policy reasons also support that conclusion. The recognition of oral recognition agreements would inevitably lead to disputes about whether an employer has agreed to recognize a union or just simply to apply the collective agreement. If legal effect were given to oral voluntary recognition there would also be disputes about the scope of that recognition. The precise wording of a certificate issued by a Board and the scope clause of a collective agreement or recognition agreement are critical for the operation of the Act. In the absence of a written agreement the precise scope of the union's representational rights may be unclear to the parties and will be certainly unclear to anyone not a party to the relationship such as another trade union or a purchaser of the business.

22. There are two things in the collective agreement that must be absolutely clear: the term and the bargaining unit. That is because strangers to the relationship must be able to know where they stand – either employees who may or may not be in the bargaining unit, and other unions that may wish to displace the incumbent. For all of these reasons the uncertainty created by the possibility of oral or (worse yet) practice evidence is inconsistent with the purposes of the Act.

23. One argument in favour of the legal force of oral voluntary recognition agreements is hinted at in the *Universal Concerts Canada* case. That argument arises out of the fact that unlike other provisions of the Act s. 16 refers only to voluntary recognition, without any explicit requirement that the recognition be in writing. This is potentially important when interpreting s. 18, which provides the circumstances under which a conciliation officer must/may be appointed, and states:

> **18.** (1) Where notice has been given under section 16 or 59, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> (2) Despite the failure of a trade union to give written notice under section 16 or the failure of either party to give written notice under sections 59 and 131, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> (4) Despite anything in this Act, where the Minister has appointed a conciliation officer or a mediator and the parties have failed to enter into a collective agreement within 15 months from the date of such appointment, the Minister may, upon the joint request of the parties, again appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement, and, upon the appointment being made, sections 19 to 36 and 79 to 86 apply, but the appointment is not a bar to an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit.

24. The two relevant sections referred to in s. 18(1), sections 16 and 59, state:

> **16.** Following certification or the *voluntary recognition* by the employer of the trade union as bargaining agent for the employees in the bargaining unit, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement. [emphasis added]
>
> **59.** (1) Either party to a collective agreement may, within the period of 90 days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.
>
> (2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

25. The difficulty arises because notice to bargain pursuant to s.16 must follow certification or "voluntary recognition", while notice to bargain under s. 59 relates to renewal collective agreements. Therefore, s. 18(1), which applies to a notice to bargain under s. 16 or s. 59 would appear to apply to a notice to bargain given after voluntary recognition. Section 18(3) also provides for the possible appointment of a conciliation officer after voluntary recognition. However, in order for s. 18(3) to apply, the voluntary recognition agreement must be in writing.

26. There is a possible explanation for the fact that two provisions of s. 18 apply to voluntary recognition which is of assistance to the union in this case. That is that the Legislature intended s. 18(1) and s. 18(3) to apply to different circumstances. Given the absence in s. 16 of the words "in writing signed by the parties", this interpretation could make a distinction between written voluntary recognition agreements and oral voluntary recognition agreements. Under that theory, s. 18(1) applies to oral voluntary recognition agreements and s. 18(3) applies to written voluntary recognition agreements. However, in that case s.16 must only apply to oral recognition agreements.

27. The difficulty with that argument is, while it gives effect to all of the words in the statute, it makes no labour relations or other sense. That is because under s. 18(1), which under this theory would apply to oral voluntary recognition agreements, the Minister *must* appoint a conciliation officer. However, if the voluntary recognition agreement is in writing, then under s. 18(3) the Minister *may* appoint a conciliation officer. One might think of an explanation were it the other way around, but there is no possible labour relations or policy reason to provide for mandatory conciliation in the case of oral voluntary recognition agreements and discretionary conciliation in the case of written recognition agreements.

28. I note that there is another possible explanation for the way that "voluntary recognition agreements" are described in the Act: a drafting error. However, in the circumstances of this case, it is unnecessary for me to decide this issue.

29. In my view, s. 18 deals simply with WHEN a conciliation officer has been appointed:

(1) Where notice has been given;
(2) Where the parties have met;
(3) Where the parties have entered into a written VRA (presumably this is notice of a sort itself)
(4) On joint request after the first one gives up.

It has no impact of the interpretation of section 16 at all.

30. In my view the case relied upon by the union, *The Corporation of the City of Thunder Bay Telephone Division (operating as Thunder Bay Telephone)* [1994] 27 CLRBR (2d) 87 is entirely distinguishable. In that case, a decision of the Canada Labour Relations Board, the Board stated: "In our view, the parties have, by their conduct, entered into valid voluntary recognition agreements within the meaning of section 3 of the [Canada Labour] Code". However, in that case the "conduct" was an agreement to extend the term of existing collective agreements and the agreement to do so was in writing, by letters which were presumably signed.

31. For all of these reasons, I am satisfied that bargaining rights do not transfer to Arrow even where there exists a verbal voluntary recognition agreement. Accordingly, this branch of the union's argument fails.

32. I next consider the union's estoppel argument.

33. In *Canadian National Railway Co. et al. vs. Beatty et al.* [1982] 34 O.R. (2d) 385, Divisional Court said at pp. 389-390:

> The arbitrator later sets out the principle as enunciated by Denning L.J. in *Combe v. Combe*, [1951] 2 K.B. 215, [1951] 1 All E.R. 767 at p. 770. That exposition of the doctrine was as follows:
>
> > The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.
> >
> > Elsewhere, Denning L.J. is said to have explained that the doctrine is only applicable where the parties have already entered into a definite and legal contractual or analogous relationship, when there exists some conduct or promise which induces the other party to believe that the strict legal rights under the contract will not be enforced or will be kept in suspense and that "having regard to the dealings which have taken place between the parties" it will be inequitable to allow that party to enforce their strict legal rights.
>
> The arbitrator found as a fact, as he was bound to do in view of the agreed statement, that the employer adhered to a course of conduct which reasonably induced the union to believe that the entitlement of the employees in question to sickness benefits would not be governed by the strict legal rights set out in art. 30 but rather would conform to the long-standing practice of paying wages during a waiting period. He found also that it would be inequitable to allow the employer to insist on the terms of art. 30 as the limit of its obligation to the employees. As submitted to the arbitrator by the union if there had been any indication given by the employer that it had intended to commence applying the terms of art. 30 strictly despite the opposite practice of so many years, the union would have had the opportunity of seeking to negotiate a clause in the agreement to preclude the employer from so doing. At the foot of p. 10 of his award (record, p. 14) the arbitrator finds:
>
> > The detrimental reliance then of assuming the practice would continue, lies in the union's inability to require the employer to negotiate its change in its practice during the life of this agreement. After a practice of this duration, if the employer anticipated changing it, it had an "affirmative duty" to alert the union of its intention in order to give it an opportunity to negotiate a note of the kind the parties fashioned for their vacation package.

> The employer argued also that even if the doctrine of estoppel could be applied, its position as a successor employer relieved it of any obligations other than those found in the strict wording of the agreement.
>
> To this the arbitrator replied that s. 144 of the Canada Labour Code providing that a successor employer "is bound by any collective agreement that is ... applicable to the employees employed in the business" does not mean bound only by the written terms of such agreement. In the view of the arbitrator, that provision should be read as "embracing any obligations that arise out of and are related to those terms of the agreement even if they are not expressly set out in writing". In other words, the employer must accept the agreement to which it succeeds subject to all the equities, if any, that attach to such agreement.

34. For the purposes of this decision I assume that bargaining rights which are created by an estoppel can flow on the sale of a business. However, even on that assumption, the Union's estoppel claim must fail for two reasons.

35. First, I do not agree that, on the material facts as alleged by the Union, there was a clear promise or representation made by Bingo Press. Bingo Press did, on the alleged facts, make a number of verbal representations to the effect that it would recognize the Union for the Niagara Falls facility. It also promised to and did apply the terms of the collective agreement to Niagara Falls. However, when the Union asked that Bingo Press actually amend the collective agreement, it declined to do so. It was therefore unclear what Bingo Press was intending to do. In my view, in that context, the representation made by Bingo Press was entirely ambigious.

36. Second, I am also of the view that there can be no finding of detrimental reliance on the facts alleged. Bingo Press' actions in refusing to amend the collective agreement were surely a sign to the Union that its bargaining rights were not secure with respect to Niagara Falls, particularly in the context of the uncertainty then existing at Bingo Press. Once it realized that Bingo Press would not amend the collective agreement, the Union had an opportunity to request leave of the court to file an application for certification.

37. More importantly, the Union was in no different position at the time that Arrow purchased the business than it was when Bingo Press made its oral representations about recognizing the Union. It could have filed an application for certification after Arrow purchased the business. Such an application would not have required leave of the court and would have involved the same group of employees. The Union does not claim it would have been in a worse position to succeed in such an application. Indeed the Union may not even have had to have the employees sign membership cards as many of them were already members of the Union. Therefore, to the extent there was reliance on the employer's conduct, there was no detriment to the Union.

38. The idea that representation rights can arise out of an estoppel is also somewhat problematic, particularly since the employer could presumably rely on the strict terms of the collective agreement at the next round of bargaining. Although the employer would be required to negotiate in good faith, the Union could not resort to a strike to compel the employer to amend the scope clause of the collective agreement. It is difficult to see how that outcome makes labour relations sense.

39. For all of the forgoing reasons I find that there is no prospect that the Union could, in its s.69 application, obtain a remedy which gives it bargaining rights over Arrow's Niagara Falls operations, and accordingly Arrow's motion to have the application dismissed for failing to prove a *prima facie* case is granted. The application in Board File No. 3228-05-R is dismissed. The Board's advice to the Minister in Board File No. 0181-06-M is that:

> the Minister does not have the authority to appoint a conciliation officer with respect to Arrow Games at its location in Niagara Falls as the Union does not have bargaining rights with respect to that location.

0883-06-ES Carol Betts, Applicant v. **Brookfield Lepage Johnson Controls Facility Management Services Ltd.**, SNC-Lavalin Profac Inc. and Director of Employment Standards, Responding Parties.

Employment Standards – The applicant claimed severance pay from Brookfield Lepage, a company providing property management services, after it was replaced by Profac – The applicant was hired by Profac within 13 weeks of the replacement – As both Profac and Brookfield Lepage were building services providers pursuant to the ESA, s. 10 applied – Therefore the applicant's employment with Brookfield was deemed not to have been terminated and her employment with Profac will include her length of employment with Brookfield for the purposes of the ESA – Application dismissed

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Carol Betts* appeared on behalf of herself; *John P. Illingworth* and *Ariela Constantinidis* for Brookfield Lepage Johnson Controls Facility Management Services Ltd.; *Andrew McCreary* and *Marni Dicker* for SNC-Lavalin Profac Inc.; *Grainne McGrath* and *Janis Zakoor* for the Director of Employment Standards.

DECISION OF THE BOARD; April 3, 2007

Introduction

1. Carol Betts claims severance pay from Brookfield Lepage Johnson Controls Facility Management Services Ltd. ("Brookfield") pursuant to the *Employment Standards Act, 2000*. Brookfield resists her claim, arguing the "building services provider" provisions of the Act relieve it of liability because Ms. Betts was hired by SNC-Lavalin Profac Inc. ("Profac"). The success of Ms. Betts' claim turns upon the proper interpretation of these provisions of the Act.

2. The building services provider provisions are of significant interest to persons engaged in bidding on contracts to provide services for a building with respect to food, security, cleaning, parking, concession stands and property management. Generally, such contracts are periodically re-tendered by the building owners. Typically, when an employer loses a contract to provide such services for a building, it is left with more employees than it has work for. At the most general level, section 75 of the Act has the effect of shifting liability for Part XV

termination and severance pay owing to some employees who lose their employment as a result of this process from the replaced provider to the new building services provider. However, if the new provider hires an employee of the replaced provider, section 10 of the Act provides the employee's employment is deemed not to be terminated, no termination or severance pay is payable to the employee, and the employee's service with the replaced provider is deemed to be service with the new provider for the purposes of the Act. Among other things, this creates a contingent liability for the new provider since the employee's deemed service may entitle the employee to additional termination or severance pay if his or her employment is subsequently terminated by the new provider.

3. Brookfield and Profac are both large companies which provide property management services to numerous facilities across the province, and indeed across the country. They frequently compete with each other for contracts and may replace one another in turn in providing property management services for a particular facility. In bidding on those contracts, they share a common interest in having a clearer understanding of when the building services provider provisions of the Act will apply to create liabilities if employees are not hired or contingent liabilities if they are.

4. In this case, Brookfield provided property management services to Public Works and Government Services Canada ("PWGSC") pursuant to several contracts as a result of a decision by PWGSC to outsource the work. Approximately 300 buildings across Canada were subject to the contracts. Brookfield states that 329 employees were involved in the contracts applicable to Ontario. PWGSC re-tendered the contracts. In November 2004 it awarded the contracts to Profac, effective April 1, 2005.

5. Brookfield terminated the employment of numerous employees as a result of the loss of its contracts with PWGSC. Profac hired some of those employees, but not all. Numerous employment standards claims were filed. Many of those claims related to liability for termination and severance pay. Orders were made in relation to some 82 individuals. The only claim before me, however, is that of Carol Betts: it appears that all of the other claims have been resolved.

6. Carol Betts had been employed by PWGSC. When it decided to outsource the work, she was "transitioned" to Brookfield. During the course of her employment with Brookfield she worked exclusively on one of the contracts with PWGSC. She held the position of Portfolio Officer. Her work related to a portfolio of several buildings subject to the contract, but her office was not located in a building subject to the contracts and she rarely spent any time in those buildings. She was responsible for managing the implementation of a quality management system at the portfolio level relating to the performance of cleaning and maintenance. She participated in the development of the system for the parties, which was than applied to other portfolios across the country.

7. After Brookfield learned that it was not successful in its bid to continue to provide property management services to PWGSC, it advised the affected employees, including Ms. Betts, their employment would be terminated effective March 31, 2005. Specifically, by letter dated December 10, 2004, Brookfield told Ms. Betts that her employment would be terminated effective March 31, 2005. Brookfield terminated Ms. Betts' employment on that date. Profac hired Ms. Betts effective April 1, 2005.

8. Ms. Betts takes the position that she is entitled to severance pay from Brookfield. Brookfield takes the position that Ms. Betts' situation is covered by the "building services provider" provisions of the Act with the result that her employment is deemed not to be terminated or severed for the purposes of the Act and her service with Brookfield is deemed to be service with Profac. Profac agrees with Ms. Betts: it states that she was hired as a new employee. An employment standards officer agreed with Brookfield and declined to issue an order to pay against it in favour of Ms. Betts. The officer also stated that Profac was obligated to hire Ms. Betts or to pay her severance pay and further held that Profac was required to recognize Ms. Betts' seniority. As noted Profac did hire Ms. Betts and states that following the officer's decision it voluntarily recognized Ms. Betts' service. Ms. Betts applies for review of the officer's decision.

Analysis

9. At the hearing, all of the parties agreed that Ms. Betts' entitlements needed to be determined by examining her individual circumstances. Accordingly, virtually all of the argument and much of the evidence was directed to the nature of Ms. Betts' duties and specifically whether or not she was engaged in providing "building services" and if so whether or not she was engaged in providing them "at the premises". With the greatest of respect, in my view the parties' arguments were addressed to the wrong question.

10. The issues addressed by the parties arise from section 75 of the Act, not section 10. Section 75 of the Act provides:

> **75.** (1) This Part applies if a building services provider for a building is replaced by a new provider.
>
> (2) The new provider shall comply with Part XV (Termination and Severance of Employment) with respect to every employee of the replaced provider who is engaged in providing services at the premises and whom the new provider does not employ as if the new provider had terminated and severed the employee's employment.
>
> (3) The new provider shall be deemed to have been the employee's employer for the purpose of subsection (2).
>
> (4) The new provider is not required to comply with subsection (2) with respect to,
>
> (a) an employee who is retained by the replaced provider; or
>
> (b) any prescribed employees.

11. Section 75(2) shifts the obligation to comply with the termination pay and severance pay provisions from the replaced provider to the new provider "with respect to every employee of the replaced provider who is engaged in providing services at the premises and whom the new provider does not employ ". In this case, however, Profac employed Ms. Betts. Section 75, therefore, does not apply.

12. Section 10 of the Act provides:

> **10.** (1) This section applies if the building services provider for a building is replaced by a new provider and an employee of the replaced provider is employed by the new provider.
>
> (2) The employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the replaced provider shall be deemed to have been employment with the new provider for the purpose of any subsequent calculation of the employee's length or period of employment.
>
> (3) Subsection (2) does not apply if the day on which the new provider hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the replaced provider and the day on which the new provider began servicing the premises.
>
> (4) For the purposes of subsection (2), employment with the replaced provider includes any employment attributed to the replaced provider under this section or under a provision of a predecessor Act dealing with building services providers.

13. Nothing in section 10 restricts its application to employees of the replaced provider "engaged in providing services at the premises". Nothing in section 75 makes this condition applicable to section 10.

14. Section 10 is not the mirror image of section 75. A determination that the new provider would not owe the employee termination or severance pay is not the same as a determination that the new provider is not required to recognize the past service of the employee. If the new provider hires the employee, then it may be obliged to recognize the past service of that employee, even if it would not have been liable for termination and severance pay owing to that employee had it failed to hire the employee.

15. Section 10 does not oblige the new provider to hire employees of the replaced provider. It merely specifies what happens if the new provider hires employees of the replaced provider within 13 weeks of the employee's last day of employment with the replaced provider or the day on which the new provider began servicing the premises, which ever came first: see section 10(3). If the new provider does not hire the employees then they may be entitled to termination and severance pay. Whether the new provider or the replaced provider is responsible for any such termination or severance pay will depend on whether section 75 applies to transfer liability to the new provider.

16. Section 10 provides for two results when two preconditions are met. The two preconditions are: (1) that a building services provider for a building is replaced by a new provider; and (2) that an employee of the replaced provider is employed by the new provider. The two results are: (1) that the employment of the employee is not terminated or severed for the purposes of the Act; and (2) the period of employment of the employee with the replaced provider is deemed to have been employment with the new provider. This is subject to the exception in section 10(3).

17. In this case, there is no dispute that Ms. Betts was an employee of Brookfield and that she was employed by Profac. The central question, therefore, is not whether Ms. Betts was engaged in providing "building services at the premises", but whether Brookfield, and its replacement Profac, is a "building services provider" within the meaning of the Act.

18. Section 1(1) of the Act and defines "building services provider" and "building services" as follows:

> "building services provider" or "provider" means a person who provides building services for a premises and includes the owner or manager of a premises if the owner or manager provides building services for premises the person owns or manages;
>
> "building services" means services for a building with respect to food, security and cleaning and any prescribed services for a building;

Section 1 of Ont. Reg. 287/01 prescribes the following as services for a building for the purposes of section 1 of the Act:

> 1. Services that are intended to relate only to the building and its occupants and visitors with respect to:
>
>   i. a parking garage or parking lot, and
>   ii. a concession stand
>
> 2. Property management services that are intended to relate only to the building.

19. The parties filed a statement of agreed facts which specified that the contract held by Brookfield was for "property management services", that the contract was tendered by PWGSC and that Profac became the "new provider". That is, overall the parties agreed that Profac replaced Brookfield as a provider of "property management services". While additional detail was provided to the Board as to the scope of the work covered by the contract through oral statements adopted by all parties, this was done within the context of arguing whether a particular employee, Ms. Betts, was engaged in providing building services at the premises. I see no reason to look behind the agreement of the parties as to the overall nature of the services provided by Brookfield and Profac and would be loath to do so in the absence of specific evidence and argument by the parties on this point.

20. The issue remains whether the property management services provided were "property management services that are intended to relate only to the building" so as to bring them within those "services for a building" prescribed by the regulation to be "building services" within the meaning of the Act. It was suggested that a problem arises because some of the property management services related not to one building but a portfolio of buildings. In my view, there is no merit to this suggestion. The phrase "that are intended to relate only to the building" is simply part of the description of a type of "services for a building" prescribed to be "building services". It would be absurd to suggest that what would constitute building services for the purposes of the Act if it related only to one building would not if it related to two buildings. No discernible policy rationale exists for such an arbitrary distinction.

21. Thus, I conclude, based on the agreed fact that Profac replaced Brookfield as a provider of "property management services", that Profac replaced Brookfield as a provider of "building services". Further, I note that during the hearing counsel for Brookfield asserted that all parties agreed that this was the case and was not contradicted on this point.

22. In the result, since Profac replaced Brookfield as a building service provider and Profac employed Ms. Betts within 13 weeks of doing so, I conclude that section 10 applies. Ms. Betts' employment is deemed not to have been terminated or severed for the purposes of the Act, with the result that Brookfield does not owe Ms. Betts severance pay (and Profac does not owe her severance pay at this time) and her period of employment with Brookfield is deemed to have been employment with Profac.

DISPOSITION

23. The application is dismissed.

1207-06-HS Cancoil Thermal Corp., Applicant v. Brad Moon, Inspector and United Food and Commercial Workers International Union, Local 175, Responding Parties.

Health and Safety – Cancoil challenged the Inspector's jurisdiction to make an order under s. 54(1)(f) of the *OHSA* requiring Cancoil to conduct a heat stress assessment – The Board found that on a proper interpretive approach (given the remedial nature of the Act and providing the legislation with a broad and liberal interpretation in order to protect the health and safety of workers) temperature may be one form of "physical agent" and accordingly a heat stress assessment may be the proper subject of an order by an Inspector pursuant to s. 54 of the Act – Matter Continues

BEFORE: *Tanja Wacyk*, Vice-Chair.

SUBMISSIONS: *Maureen Ball Farson* and *Caroline Thomas* for the applicant; *William Robinson* for the Inspector; *Naveen Mehta* for United Food and Commercial Workers Internationl Union, Local 175.

DECISION OF THE BOARD: April 26, 2007

BACKGROUND:

1. This is an appeal of an Order made on June 15, 2006, by Occupational Health and Safety Officer Brad Moon brought pursuant to section 61 of the *Occupational Health and Safety Act*, R.S.O. 1990 ch. O-1 (the 'OHSA' or the 'Act').

2. At the first day of hearing in this matter, the employer challenged for the first time, the inspector's jurisdiction pursuant to section 54(1)(f) of the OHSA, to issue an order requiring that the employer conduct a heat stress assessment. Pursuant to my order to that effect, the parties addressed that issue through written submissions. By decision dated April 25, 2007, I issued a

"bottom-line" result, with reasons to follow. In that decision I found that section 54(1)(f) of the OHSA provides the jurisdictional ground for an inspector to issue an order to have a heat stress assessment carried out by the applicant.

3. This decision provides the reasons for that determination.

Applicant's Submissions

4. Cancoil Thermal Corp. ("the applicant") is an industrial workplace engaged in the manufacturing and production of refrigeration, air conditioning, ventilation, and Original Equipment Manufacturer (OEM) coils. The company has been in operation since 1983.

5. The specific order with which the applicant takes issue was Order No. 1, which was made pursuant to section 54(1)(f), and states as follows:

> An Inspector may, for the purposes of carrying out his or her duties and powers under this act and the regulations, (f) require in writing an employer to cause any tests described in clause (e) to be conducted or taken, at the expense of the employer, by a person possessing such special expert or professional knowledge or qualifications as are specified by the inspector and to provide, at the expense of the employer, a report or assessment by that person;
>
> THIS ORDER APPLIES TO AN OCCUPATIONAL HYGIENIST TO CONDUCT A HEAT STRES ASSESMENT IN THE LARGE COIL AREA AND THE COPPER AREA. THE ASSESMENT SHALL INCLUDE THE PARAMETERS INCLUDED IN THE NARRATIVE OF THIS REPORT[sic].

6. The parameters included in the narrative of the report required that a heat stress assessment be conducted by an Occupational Hygienist in mid-July 2006, at the applicant's expense. The Inspector further ordered that the assessment focus on the copper room and the large coil room, and that it assess worker exposure to heat stress, and the workload for each job classification. Further, he ordered that the assessment include recommendations for control of worker exposure to heat stress, fluid intake, and a work-rest regimen.

7. The applicant asserts that in its twenty-four years of operation, it has never had a heat-related illness among its workers, nor a complaint of heat-related illness. It maintains that the nature of the work performed at its premises does not expose workers to high temperatures, and that no finding of extreme temperature was made.

8. The applicant submitted the Inspector lacks jurisdiction to order a heat stress assessment for the following reasons:

> a. Temperature, unless it is extreme, is not appropriately considered under the narrow terms of section 54(1)(f);
>
> b. The *Occupational Health and Safety Act* contemplates assessment of ambient workplace temperature under alternative provisions, which were available to the Inspector, and;

> c. Section 54(1) of the Act does not give inspectors authority to order tests of workplaces where there is no adequate reason to believe that a workplace safety concern exists. Inspectors should not be allowed to enter any workplace and order any test to be conducted without sufficient basis, as this constitutes a violation of employers' privacy.

Section 54(l)(f) does not Authorize an Assessment of Ambient Temperature

9. The applicant submits that workplace heat and temperature are not explicitly addressed in the OHSA, and that a review of all regulations to the Act reveals only one reference to temperature, which establishes a minimum rather than a maximum temperature i.e. section 129(1) of Regulation 851/90 states that an employer shall ensure that the temperature in an industrial establishment is at a level suitable for the type of work performed, and shall not be below 18 degrees Celsius. Section 129(2) provides exceptions to this minimum temperature requirement, such as where the workplace is normally unheated, or the work involves perishable goods.

10. The applicant notes that the inspector ordered that a heat assessment be conducted, pursuant to his authority under section 54(1)(f) of the Act. That section authorizes an inspector to order any test described in 54(1)(e), which includes "tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent in or about a workplace and for such purposes, take and carry away such samples as may be necessary." The applicant submits temperature is covered by section 54(1)(e) and (f) only if it falls under the category of "physical agent."

11. The applicant submits that like heat, "physical agents" are not defined in the Act. The applicant relies on the discussion in *Re: Ontario Public Service Employees' Union*, [1996] O.O.H.S.A.D. No.18 (Office of Adjudication) wherein Adjudicator Blair noted that employers and inspectors may consider "standards set by credible outside organizations where regulations have not been promulgated under the Act".

12. The applicant submits that the Canadian Centre for Occupational Health and Safety ("CCOHS") is a federal government agency whose mandate is to prevent and eliminate workplace illness and injury. The applicant submits that the CCOHS defines physical agents as "sources of energy that may cause injury or disease. Examples include noise, vibration, radiation, and *extremes in temperature* and pressure" (emphasis added).

13. The applicant submitted that, consistent with industry standards, temperature may be considered a "physical agent" only when it is at an extreme level. It maintains that ambient workplace temperature, absent a finding of extremity, does not meet the industry definition of a "physical agent".

14. Thus, the applicant argued, there must be some threshold beyond which temperature becomes a physical agent, and that absent a threshold marker, any workplace would be subject to a heat assessment due to the mere perception of a change in temperature. For example, an inspector who noticed a temperature difference between air-conditioned office rooms would be authorized to order a heat stress assessment at an employer's expense. The applicant submits that the legislation was not meant to operate in this way. Consequently, the applicant argued that the

mere perception of temperature differential between rooms does not justify a conclusion that heat is a "physical agent" that threatens worker safety.

15. The applicant pointed out that the inspector made no observations in his report about how the temperature would affect worker safety, nor how it might combine with other workplace factors to pose a threat to worker safety. The applicant further notes that the Inspector did not observe an extreme in temperature, nor take any recording of the workplace temperature. Consequently, the applicant argues there was no basis upon which to order the costly assessment, other than a perceptible difference in temperature between rooms.

16. The applicant, therefore, submits that the Inspector lacked jurisdiction to order a heat assessment, as no extremity in temperature was observed that would qualify as a physical agent within the meaning of section 54(1)(e).

Ambient Temperature May be Assessed Pursuant to Alternative Provisions

17. The applicant submitted that where an issue relating to heat arises, but no extreme in temperature is observed, inspectors may still order an assessment of ambient working temperature, pursuant to alternative provisions in the Act. The applicant argued that ambient workplace temperatures may be dealt with under section 25(2)(h), a provision that imposes a general duty upon employers to take "every precaution reasonable in the circumstances for the protection of a worker." The applicant submitted that this generally-worded provision allows for monitoring of any workplace circumstances that are not otherwise covered in the Act, including workplace temperature.

18. The applicant further submitted that section 56 authorizes an inspector to obtain a warrant from a Justice of the Peace where the inspector has reasonable grounds to believe that a violation of the Act or the Regulations has been committed. This includes the reasonable belief that an employer has failed to comply with his or her section 25(2)(h) duty, by exposing workers to inappropriate temperatures. The applicant pointed out that testing under this provision is not conducted at the employer's expense. Moreover, section 56(1.2)(e) states that the warrant may authorize the inspector to take measurements of and record by any means the *physical circumstances* of the workplace" (emphasis added). According to the applicant, in this way, an inspector is able to assess ambient workplace temperatures. However, it submits that "physical circumstances" are not included in the testing provided for under sections 54(1)(e) and (f).

19. In addition, the applicant points out that, pursuant to section 55, an inspector may order a worker health and safety representative to assess the "*physical condition* of all or part of a workplace at specified intervals" (emphasis added). According to the applicant, this provision allows inspectors to address general workplace conditions, including workplace temperature, without the requirement of a warrant. However, the applicant again submits that "physical conditions" are not covered by sections 54(1)(e) or (f).

20. Similarly, the applicant points out that "physical conditions" are discussed in section 43(3) of the Act. Under this provision, a worker is entitled to refuse to work where the "*physical condition* of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself" (emphasis added).

21. The applicant asserts that the reference to "physical conditions" and "physical circumstances" in certain provisions in the Act [i.e., section 43(3); section 55; and section 56 (1.2)(e)], together with the specific reference to "physical agents" in section 54(1)(e), indicates a legislative intention to exclude general physical conditions from the investigative powers of section 54. In other words, if the legislature intended to extend the investigative powers granted under section 54 to include temperature, it easily could have included the term "physical conditions", "physical circumstances", or "temperature" in the provision.

22. However, the applicant points out that section 54 does not include those terms. Rather, section 54(1)(e) authorizes an inspector to order an assessment of a "physical agent," rather than "physical conditions" as authorized under alternative provisions in the Act. The applicant maintains this indicates that physical conditions such as ambient temperature should not be assessed pursuant to section 54, but rather, pursuant to sections 55 or 56.

23. Consequently, the applicant argued that the mere perception of a change in temperature between rooms does not qualify as a physical agent within the meaning of section 54(1)(e), and that the Inspector lacked jurisdiction to order a heat assessment pursuant to the "physical agents" category of section 54(1)(e). Rather, pursuant to industry custom, only extremes in temperature constitute a physical agent, and the applicant maintained the Inspector did not observe anything that could reasonably be interpreted to qualify as an extreme in temperature. As a result, the applicant argued that the order exceeded the Inspector's jurisdiction, and should have been brought pursuant to an alternative power in the Act.

Unfettered Discretion Constitutes a Violation of Privacy

24. The applicant acknowledged the importance of ensuring occupational health and safety, but maintained that no arm of the government has unlimited authority and discretion. The applicant submitted that to enable an occupational health and safety inspector to enter any workplace and to order any test without reasonable grounds constitutes an abuse of authority.

25. In that regard, that applicant reiterates that in the instant case, the Inspector did not take the temperature. Rather, he observed only a noticeable difference in temperature between rooms, and made no finding that the heat was excessive or extreme, or that it posed a danger to worker health and safety. The applicant maintains that, in fact, the inspector did not find any violation of the applicant's duty pursuant to section 25(2)(h) to take reasonable precautions to ensure safety. Nor did he record any observation that could reasonably support a belief that there was a violation of the Act.

26. The applicant submits this is not a sufficient basis upon which to order a heat stress assessment, and that such an order constitutes a violation of the applicant's reasonable expectation of privacy. It submitted that inspectors should not be authorized to enter any workplace, and order costly assessments without a valid and reasonable basis on which to believe that there is a health and safety issue. Moreover, the applicant submitted that section 54 does not grant authority to inspectors to look for problems where there is no reasonable basis to believe there has been a violation of the Act.

MINISTRY RESPONSE (CONCURRED WITH BY THE UNION):

27. The Ministry submits that the proper interpretation of the OHSA, one in keeping with the underlying purpose of protecting the health and safety of workers, provides the jurisdictional ground for an inspector to issue an order to have a heat stress assessment carried out by an employer.

28. In that regard, the Ministry submits that thermal or heat energy meets the definition of a 'physical agent' for the purposes of the OHSA in general and of section 54(1)(f) in particular.

Proper Scope of the Preliminary Jurisdictional Issue

29. The Ministry submitted that the purpose of the written submissions was to address the proper statutory interpretation of the relevant legislation. More specifically, the parties were to address the statutory definition of "physical agent" in section 54(1)(e), and whether "heat" falls within this definition. The Ministry submits that the applicant's submissions contain evidentiary claims that are not properly within the scope of the written submissions. Specifically, the Ministry takes issue with the references to the Inspector's observations and the applicant's record with regard to heat related issues.

30. The Ministry argues those submissions are all evidentiary claims that are not properly directed at the issue of statutory interpretation. Rather, the Ministry maintains those evidentiary points are directed at the distinct issue of whether the Inspector had reasonable grounds to issue the particular Order that is being challenged. As an example, the Ministry pointed out that the applicant's assertion that there was "no adequate reason to believe that a workplace safety concern exists" is a claim about the reasonableness of the issuance of the Order, and does not bear upon the question of what is the proper statutory interpretation of sections 54(1)(e) and 54(1)(f).

31. The Ministry submits the Board should disregard these evidentiary claims, as they are outside the scope of the purpose for these submissions and have not been adduced through oral examination. In the alternative, should the Board be of the view that submissions on anticipated evidence are required for the determination of the jurisdictional issue, the Ministry requests the opportunity to provide such submissions.

The Definition of 'Physical Agent' Includes 'Heat' for the Purposes of the OHSA

32. The Ministry submits that on a proper interpretation of the OHSA as a whole, and with regard to sections 54(1)(e) and 54(1)(f) in particular, the definition of 'physical agent' used in these sections includes "heat" or thermal energy.

The Proper Interpretive Framework

33. The Ministry submits that the proper interpretive approach to the OHSA begins with recognizing it as a remedial statute, one which should receive a large and liberal interpretation that will best accord with the scheme and purpose of the statute as a whole. (*Interpretation Act*, R.S.O. 1990, c.I.11, s.10; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27).

34. The Ministry argued that it is well established that the OHSA is a public welfare statute, the purpose of which is to maintain and promote a reasonable level of protection for the health and safety of workers. Consequently, the Ministry submitted that the OHSA should be broadly construed in a manner that best ensures the realization of this purpose. As the Court of Appeal for Ontario in *Hamilton (City)* stated with respect to the OHSA:

> Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objects are to be avoided. *Ontario (Ministry of Labour) v. Hamilton (City)*(2002), 58 O.R. (3d) 37 per Sharpe J.A. at para. 16 (QL).

Definition of "physical agent"

35. The Ministry conceded that "physical agent" is not defined in the Act. However, it submitted that "agent" is defined in Black's Law Dictionary as "something that produces an effect". The Ministry argued that this term should be read in relation to the statute as a whole and in relation to the regulations made under the Act.

36. The Ministry further submitted that section 54 of the Act prescribes the duties and powers of an inspector. In particular, subsection 54(1)(f) expands upon the powers outlined in subsection (1)(e). The Ministry points out that section 54(1)(e) states that an inspector may, for the purposes of carrying out his or duties under the Act and regulations "conduct or take tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent in or about a workplace and for such purposes, take and carry away such samples as may be necessary." Section 54(1)(f) allows the inspector to impose upon an employer the obligation to have tests of a "physical agent" conducted by a person possessing "special or expert or professional knowledge or qualifications" as identified by the inspector, and to bear the costs of such tests.

37. The Ministry argued that an inspector is appointed with the duties to administer and enforce the Act and the regulations, pursuant to section 6(1) of the Act. In keeping with the object of the Act, the inspector is accorded the duty to ensure that every reasonable precaution is taken to protect the health of workers. The Ministry argued that the powers of an inspector as outlined in section 54 should be broadly interpreted in light of this underlying duty. That is, the power of an inspector to require a test done of a "physical agent" is connected to the principle of ensuring that the health of workers is sufficiently protected at the workplace. Where an inspector suspects that a contravention of the Act may exist, these powers allow for further inquiry or examination to confirm it.

38. The Ministry notes that the effect of "temperature" on a worker in a workplace is explicitly addressed in *Regulation 851/90*, R.R.O. 1990, s.129. The Ministry submits that temperature is a type of measurement of thermal energy in a particular space, and that section 129(1)(a) states that for an enclosed workplace, the temperature shall be at a level "suitable for the type of work performed".

39. The Ministry pointed out that section 129(1)(b) further stipulates a minimum level of temperature for an enclosed workplace being that of 18 degrees Celsius. However, the Ministry submits this section does not derogate from the more general obligation imposed on an employer to ensure that the temperature is "suitable" for the work to be performed.

40. The Ministry argues that the obligation to maintain a "suitable" temperature necessarily includes the obligation to ensure that the thermal energy within a particular space is not of a level to endanger the health of a worker through such things as "heat stress".

41. In addition, the Ministry points out that sections 380 and 384 of *Ontario Regulation 213/91*, the Regulations for Construction Projects made under the Act, deals with heat in the context of air locks and work chambers. These sections stipulate that the temperature in these workplaces is not to exceed 27 degrees Celsius.

42. The Ministry also refers to a similar provision in *Ontario Regulation 67/93*, the regulation relating to Health Care and Residential Facilities. Section 21 of that Regulation explicitly deals with the potential hazards arising from heat stress, as s.21(1)(c) states that an enclosed workplace shall be maintained at a temperature "that is not likely to cause physical stress because of heat" (subject to s.21(3)).

43. The Ministry submits that by virtue of s.129 of *Regulation 851*, sections 380 and 384 of *Ontario Regulation 213/91*, and s.212 of *Ontario Regulation 67/93*, the Act implicitly identifies 'heat' as something that can affect workers at a workplace.

The Use of Industry Standards in Defining "Physical Agent"

44. The Ministry agrees with the applicant's submission that it is, in some cases, appropriate to look to industry standards in determining technical terms found in a regulation that are not explicitly defined in the Act or the regulation itself. However, the Ministry takes issue with the applicant's proposition that the definition of "physical agent" promulgated by the CCOHS i.e. "sources of energy that may cause injury or disease", and the example of "extremes in temperature" suggests that "temperature" can only amount to a "physical agent" when in its extreme form.

45. Rather, the Ministry submitted that a more reasonable interpretation of CCOHS' statement is to view "temperature" as a physical agent, "a source of energy", that, in its extreme form, can "cause injury or disease". The Ministry maintained that this interpretation is consistent in the CCOHS's web document entitled "Extreme Hot or Cold Temperature Conditions", which states that "Both very cold and very hot temperatures could be dangerous to your health. Excessive exposure to heat is referred to as 'heat stress.'" ("Extreme Hot or Cold Temperature Conditions", Canadian Centre for Occupational Health and Safety, online: CCOHS http://www.ccohs.ca/oshanswers/phys_agents/hot_cold.html?print (date accessed: 26 January 2007).

46. The Ministry further submits that even if the applicant's position is correct, this is an unduly restrictive definition of the term for the purposes of the OHSA. It argues that the mission of the CCOHS is to facilitate consultation and cooperation among federal, provincial and territorial jurisdictions, foster participation by labour and management, assist in the development and maintenance of policies and programs, and to serve as a national centre for information relating to occupational health and safety. The information it provides is intended for a wide audience, and not necessarily intended to be used as technical guidance for occupational health and safety professionals.

47. The Ministry argues that, furthermore, the CCOHS endorses the American Conference of Governmental Industrial Hygienists (ACGIH) Threshold Limit Values (TLVs) for working in hot environments. It points out that these standards are also recommended by the Ministry of Labour as a means for employers to take every precaution reasonable to protect workers in hot environments due to heat produced by machines and/or hot weather. "Extreme Hot or Cold Temperature Conditions", ibid p.2 "Heat Stress", Ministry of Labour Publication, online: http ://www.labour.gov.on.ca/English/hs/guidelines/gl_heat.html (date accessed: 26 Jan 2007).

48. The Ministry submits the ACGIH is a well-respected organization of occupational hygiene professionals. It has developed widely used TLVs for occupational exposure to certain kinds of physical agents. These TLVs provide guidance on the "levels of exposure and conditions under which it is believed that nearly all healthy workers may be repeatedly exposed, day after day, without adverse health effects". *Introduction to the Physical Agents* (excerpt), 2006 TL Vs and BEIs, ACGN Worldwide, 7th ed., p.109.

49. The Ministry submits that in the *Introduction to the Physical Agents*, the ACGIH states: "This section presents Threshold Limit Values (TLVs) for occupational exposure to physical agents of acoustic, electromagnetic ergonomic, mechanical, and *thermal nature*" (emphasis added).

50. With respect to those physical agents of a thermal nature, the Ministry points out that the ACGIH provides TLVs for 'thermal stress,' which includes "heat stress", and that "heat stress" is defined by the ACGIH as "the net heat load to which a worker may be exposed from the combined contributions of metabolic cost of work, environmental factors (i.e. air temperature, humidity, air movement, and radiant heat exchange) and clothing requirements." "Heat Stress and Heat Strain", 2006 TLVs and BEIs, ACGIH Worldwide, 7th ed., p.183.

51. The Ministry points out that the physical agent involved in the development of "heat stress" is thermal energy, which can come in various forms. The "net heat load" to which a worker may be exposed is a combination of various forms of energy, namely thermal or heat energy, which, it is submitted, meets any reasonable definition of a physical agent. The Ministry submits that the inclusion of thermal energy within the definition of "physical agent" is consistent with the purposes of the Act and furthers the object of protecting the health of workers. This is because it recognizes that thermal energy can come in various forms from different sources, all of which combine to form the "net heat load" to which a worker can be exposed.

52. The Ministry argued that restricting the definition of "physical agent" to include "temperature" only in its extreme form unduly narrows the scope in which an inspector can investigate the various ways the "net heat load" can affect a worker at a particular workplace. The Ministry maintained that temperature is but one aspect to consider when determining the effect of heat on a worker. In addition, the Ministry submitted that the term "extreme" as part of the definition is vague. It submitted that the applicant has not provided an industry standard or commonly accepted usage of this term, so it remains uncertain as to what point the inspector's statutory authority to request an assessment is triggered.

53. The Ministry further argued that the applicant's interpretation of "physical agent" does not best accord with the purposes underlying the Act. It runs contrary to well-established

jurisprudence on the interpretation of the Act and with the use of the term by occupational hygienists and other occupational health and safety professionals.

The Nature of the Workplace Hazard: Heat Stress

54. The Ministry maintains that a definition of "physical agent" that includes thermal energy or "heat" would increase an inspector's ability to investigate potential health hazards and focus more employers' attention and resources on worker health. The Ministry points out that section 130 of *Regulation 851*, R.R.O. 1990 imposes, on employers, the obligation to train a worker who may be exposed to a physical agent "in the proper use of emergency measures and procedures" (clause (c)). The Ministry submitted that the broader definition of "physical agent" it proposes would increase responsibility to train and educate workers on the potential hazards with respect to heat.

55. The Ministry pointed out that workers exposed to various sources of thermal energy can be vulnerable to heat-related illness, disability and even death, and that such hazards include heat rashes, heat cramps, heat exhaustion, and even heat stroke. "Heat Stress" supra at p.3-5.

56. The Ministry pointed out that the ACGIH states, with respect to heat stress:

> A mild or moderate heat stress may cause discomfort and may adversely affect performance and safety, but it is not harmful to health. As the heat stress approaches human tolerance limits, the risk of heat-related disorders increases. "Heat Stress and Heat Strain", supra at p.183

57. The Ministry indicated that the potential for serious harm rising out of "hot" conditions at a workplace is addressed in one prosecution under the OHSA. In *R. v. Weston Bakeries Limited and Noel Morris* (unreported, February 16, 2004, Ont. Ct. J., Nadeau J.), a worker who had been working near a baking oven during a very hot day in the summer of 2001, died from heat prostration. The investigation revealed that approximately 15 minutes after the worker collapsed, his body temperature was 42.5 degrees Celsius. The defendant employer pled guilty to failing to take the reasonable precaution of fully implementing a heat-stress or heat-strain management plan or program, and was fined $215,000.00.

58. The Ministry submitted that in light of the significant health risk associated with heat-stress, it is imperative that sections 54(1)(e) and 54(1)(f) be interpreted broadly to enable inspectors to adequately address these risks. The Ministry submitted that the narrow definition proposed by the applicant would restrict the ability of an inspector to address "hot" conditions only where he or she has made a finding that the temperature is of a sufficient level to be a health hazard. The Ministry maintained this would undermine the principle of taking pro-active steps to prevent a hazard from becoming a reality.

Whether 'Heat' could be Assessed through Alternative Provisions under the Act

59. The Ministry also took issue with the applicant's argument that where no extreme in temperature is observed, an inspector may order an assessment of temperature pursuant to other provisions of the Act, namely section 25(2)(h), section 55, and section 56.

60. The Ministry pointed out that section 56 of the OHSA deals with the procedure for obtaining a warrant for the purpose of investigating an offence under the Act. This procedure is required in those circumstances where an inspector has reasonable and probable grounds to believe that an offence has been committed and wants to continue an investigation to furnish further evidence of the offence. According to the Ministry, the purpose of the warrant is to protect the privacy rights of those who are the target of the investigation.

61. The Ministry indicated that the requirement for a warrant is triggered once the purpose of the inspector's investigation shifts from ensuring compliance with the Act to the determination of penal liability. Where an inspector does not have reasonable and probable grounds that an offence has been committed, the inspector may use any of the powers provided in section 54. However, the Ministry submitted that within this regulatory context, the purpose of section 54 is to allow an inspector the authority to determine whether there is compliance with the statute. In that context, the purpose is to protect the public, not to find evidence of an offence [See *R. v. Inco Ltd.* (2001), 54 O.R. (3d) 495 at p. 11-13.]

62. Consequently, the Ministry argued that for section 56 to be used in the manner suggested by the applicant, the inspector would have to have determined that an offence has been committed. It maintained that taking this position would unduly restrict an inspector's ability to ensure compliance with the Act.

63. The Ministry also took issue with the applicant's suggestion that section 55 was an alternative provision under which an inspector could assess "temperature". Rather, it maintained that the purpose of this section is to allow an inspector to require a worker health and safety representative or worker member of the Joint Health and Safety Committee to conduct inspections of the workplace at specific intervals, and is linked to the timing of the inspections as required by section 9(26) of the Act. Consequently, the Ministry submitted that this would not be an appropriate section to use, as health and safety representatives are not usually qualified or trained to do assessments of heat-related hazards.

64. In any event, the Ministry submits that contrary to the applicant's argument, the term "physical conditions", as defined by the Act, is broader than the term "physical agents". Rather, it maintains the scope of the "physical conditions" of a workplace may include those physical agents that are present.

65. The Ministry submitted that this interpretation is consistent with the work refusal provisions under the Act. A worker may refuse unsafe work pursuant to section 43 if he or she has reasonable grounds to believe that "the physical condition of the workplace…is likely to endanger himself, herself or another worker". The Ministry argued that exposure to conditions that could lead to heat stress may be grounds for a worker to refuse unsafe work.

66. The Ministry also submitted that a definition of "physical conditions" that includes "physical agents" provides more protection to workers and is thus more consistent with the object of the Act.

67. The Ministry submitted that the employer is correct in its submission that temperature, in its non-extreme form, could be dealt with under section 25(2)(h) of the Act. However, the

Ministry pointed out that it is typical for an inspector to issue an order with reference to the specific relevant section of the Act, which, in this case, is section 54(1)(f).

68. The Ministry maintains that section 54(1)(f) is the appropriate section to reference in making this type of order. However, the Ministry points out that pursuant to section 61(4) of the Act, the Board has the statutory authority to make a new order in substitution of the one issued. This authority would allow the Board to determine that it is not required to make a determination with respect to the definition of "physical agent" and to re-issue the order with reference to s.25(2)(h). Since the underlying concern is worker's health, re-issuing the order under s.25(2)(h), would maintain the focus on the potential hazards relating to heat stress, and require the applicant to adequately address them.

An Inspector's Discretion under the Act

69. The Ministry also agrees with applicant's submission that an inspector should not be able to order costly assessments without a reasonable basis on which to believe that there is a health and safety issue. However, the Ministry submitted that the issue of whether the inspector has a reasonable belief is a matter to be determined by the Board should there be an appeal of an inspector's order. The Ministry submitted this is an evidentiary matter, not one that should turn on the proper construction of the statute.

APPLICANT'S RESPONSE:

70. The applicant submitted that the Ministry has not accurately stated its position with regard to section 25(2)(h). It maintains that an order for an assessment cannot be issued under section 25(2)(h). While that section imposes an obligation on employers to take reasonable care to ensure the safety of workers, it is not an enforcement provision. The applicant maintains that section 55 is not relevant to an order for an assessment. Where, however, an inspector finds a breach of section 25(2)(h), the inspector would then have the threshold in place that could trigger the application of section 56. Section 56 could give rise to an assessment order, but only where there has been a finding of a contravention of section 25(2)(h). The applicant points out that no such finding was made by the Inspector.

71. The applicant also took issue with what it interpreted to be the Ministry's request that the Board issue a new order under section 61(4) for a heat stress assessment with reference to section 25(2)(h). It submitted that changing the order in the middle of the appeal would unduly prejudice the applicant, and this discretion should not be exercised. Furthermore, the applicant argued that section 61(4) contemplates the substitution of the Board's findings for those of the Inspector. The applicant argued that jurisdictional issue does not give rise to a review of the merits that would be necessary to justify a substitute finding. The applicant maintained that a substitute order should not be made in the absence of a finding to support it.

ANALYSIS:

72. Let me begin by indicating that it was not clear whether the Ministry was requesting that I issue a new order under section 25(2)(h) at this time. Rather, it may be that the Ministry was simply arguing at this stage, that the Act provides various provisions under which the same ends can be achieved if the purpose is to protect the health and safety of workers. In any event, I

agree with the applicant that it would be inappropriate to consider amending the Order at this time.

73. I should also note that I have not given any consideration to the applicant's submissions which speak to the reasonableness of the Order, and have confined my comments to the issue of whether the Inspector has the authority to issue an order to have a heat stress assessment carried out by the applicant. The issue of the reasonableness of the Order is scheduled to be heard on May 2, 2007.

74. With regard to the issue of whether the Inspector has the jurisdiction pursuant to section 54(1)(f) of the OHSA, to issue an order requiring that the applicant conduct a heat stress assessment, I accept the Ministry's submissions in their entirety. They are thorough, well thought out, and persuasive.

75. Consequently, I find the interpretation of the legislation urged by the applicant is too narrow and overly technical. It does not reflect the remedial nature of the Act and the appropriateness of giving the legislation a broad and liberal interpretation, in order to protect the health and safety of workers.

76. To that end, I further find the applicant's argument that "temperature" is not a physical agent but "extremes in temperature" constitute a physical agent, somewhat convoluted. As pointed out by the Ministry, there is no threshold in the Act, or otherwise, indicating what constitutes temperature "extremes". Therefore, such an interpretation would result in significant uncertainty as to what point the inspector's statutory authority to request an assessment is triggered. Uncertainty in a health and safety context is to be avoided. Consequently, I find that the distinction advocated by the applicant is not appropriate in light of the mandate of the OHSA.

77. Nor am I persuaded by the argument that because temperature is addressed in the other provisions cited by the applicant, it is more appropriately addressed in those provisions. As pointed out by the Ministry, sections 55 and 56 have a specific and more narrow focus which would not be of assistance in circumstances where specific expertise may be required to determine if a heat problem exists. This is particularly the case when, as here, the focus is remedial rather than punitive. On the other hand, section 25(2)(h) provides a generic standard to provide health and safety protection with regard to matters which are not specifically addressed in the legislation. This does not, in any way, make it a more appropriate provision to address the issue of temperature.

78. Finally, there does not appear to be any dispute with regard to the applicant's argument that section 54(1) of the Act does not give inspectors authority to order tests of workplaces where there is no adequate reason to believe that a workplace safety concern exists. However, as pointed out by the Ministry, this is an evidentiary matter to be determined on the facts in each case, and does not go to jurisdiction.

DISPOSITION

79. For all the reasons set out above, I find that temperature is one possible form of physical agent. Consequently, section 54(1)(f) of OHSA provides the jurisdictional ground for an inspector to issue an order to have a heat stress assessment carried out by the applicant.

2389-06-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Chris Tranberg & Son Ltd.**, Responding Party.

Bargaining Unit – Certification – Construction Industry – Employee – The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture – The responding party was subcontracted by a road construction contractor to perform landscaping work adjacent to the construction of a new roadway – The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry – However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture – Application dismissed

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *John Tomlinson* and *Alan Haward*.

APPEARANCES: *Eli Gedalof* and *Adrian Tessier* for the applicant; *David L.W. Francis*, *Chris Tranberg* and *Jennifer Tranberg* for the responding party.

DECISION OF THE BOARD; March 5, 2006

1. The parties to this application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") agreed to have the Board deal first with whether the employees for whom the applicant seeks bargaining rights are excluded from the Act by reason of section 3(c) of the Act. The applicant elected to proceed under section 128.1 of the Act to represent a bargaining unit pursuant to section 158(2).

2. Section 3(c) of the Act provides:

> This Act does not apply,
>
> (c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;

Section 3(c) of the Act requires two conditions be met before the Board can find the Act does not apply to a particular person. That person must be "employed in horticulture" and the "primary business" of that person's employer must be either agriculture or horticulture.

3. According to the agreed statement of facts filed by the parties, the responding party is a corporation that carries on business with four distinct but related segments: a sod farm; a garden centre; landscaping; and snowploughing. The sod farm is 77 acres and produces about

96,000 square yards of sod annually. The garden centre is open to the public and sells a variety of products including seeds, sod, soil, trees, shrubs and plants. The employees of the responding party do snowploughing in the winter when there is no landscaping work or work to be done at the sod farm or garden centre. The landscaping work is carried out at construction sites and at existing commercial and residential premises. Employees may also move between the garden centre and the sod farm, or between landscaping and the sod farm or the garden centre.

4. The applicant argued the Board must consider whether the work being done by the employees on the application date was work in the construction industry and whether the responding party was an employer in the construction industry. The applicant submits that if the work done by the employees is not in the construction industry, or if the responding party is not an employer in the construction industry, then the application must be dismissed and there would be no need to determine whether section 3(c) of the Act had any bearing on this application. The applicant pointed out that section 3(c) must be interpreted by having regard to the responding party's overall business and the work the employees performed on the application date.

5. The responding party argued the proper analysis of the issue required an examination of the employer's business and the nature of employment of the persons the applicant seeks to represent. The responding party points out that even if it was an employer in the construction industry, and even if its employees were doing work in the construction industry on the application date as the applicant contends, the Board would still have to assess whether the primary business of the responding party was agriculture or horticulture and whether the employees who are the subject of this application were employed in horticulture.

6. We note section 126.1 of the Act provides:

> (1) Sections 126 to 168 set out special rules with respect to the construction industry.
>
> (2) Sections 1 to 125 also apply with respect to the construction industry.
>
> (3) If there is a conflict with respect to the application of provisions of this Act with respect to the construction industry, it shall be resolved as follows:
>
> 1. A provision in sections 126 to 144 prevails over a provision in sections 7 to 63 and 68 to 125.
> 2. A provision in sections 146 to 150 prevails over any other provision of this Act.
> 3. A provision in sections 150.1 to 167 prevails over a provision in sections 7 to 63 and 68 to 144.

The exclusions from the Act set out in section 3 apply to the construction industry provisions of the Act by reason of section 126.1(2), and more importantly, sections 128.1 and 158 do not prevail over section 3. It is clear therefore that even if the responding party is an employer in the construction industry and even if its employees were engaged in construction industry work the Board would, as the responding party argued, still have to determine whether the employees the applicant seeks to represent were employed in horticulture and whether the primary business of the responding party was agriculture or horticulture.

7. On November 8, 2006, the date this application was filed, the responding party was engaged as a subcontractor to Pioneer Construction. Pioneer Construction was building a road at Trunk Road and Boundary under contract to the City of Sault Ste. Marie. The subcontract between the responding party and Pioneer Construction required the responding party to spread topsoil, install sod and hydro seed (spreading grass seed by spraying a mixture of seed, water and fertilizer) on specified areas of land adjacent to that road (the "Work Site"). The Work Site had been graded by Pioneer Construction earlier. On the application date, the work performed by the employees to whom this application relates involved preparing the Work Site for the installation of sod and for hydro seeding. Pioneer Construction was continuing with its road construction work on that date. The responding party's employees working at the Work Site unloaded top soil from a dump truck, moved the top soil with a rubber tired backhoe to different areas of the Work Site and spread the top soil with rakes. They did only that work for the entire day. The hydro seeding and installation of sod will be done by the responding party at the Work Site in the spring of 2007. It was not done in November 2006 because sod cannot grow in winter conditions. The employees who did the topsoil work on November 8th may or may not be the employees who will be assigned to do the hydro seeding and installation of sod in the spring.

8. Section 3(c) makes clear that the Act does not apply to certain individuals who are employed in horticulture. An "employer whose primary business is horticulture" remains subject to the Act. Moreover, the status of that employer as an employer in the construction industry and the work that employer performs in the construction industry is not subject to section 3(c) since the exemption in that section relates to persons who are "employees", not their employer.

9. There is no doubt that grading land, laying sod (or spreading grass seed), planting trees or engaging in other landscaping work carried out as a part of the construction of a road, building or other structure is work that is in the construction industry. Section 1(1) of the Act defines construction industry as follows:

> "construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

See *The Jackson-Lewis Company Limited*, [1981] OLRB Rep. December 1794 where the Board, in determining that landscaping work carried out in connection with the construction of a new office building was work in the construction industry, wrote at page 1799:

> Where landscaping work is so clearly part and parcel of new construction, as it is here, any other conclusion would seem absurd.

In our view, and it is the applicant's position, if the work done by the responding party had been carried out by employees of Pioneer Construction who were involved in the road construction adjacent to the Work Site, then the Act would clearly apply to those employees.

10. Pioneer Construction was a road builder and was therefore an employer within the meaning of section 126(1) of the Act which defines "employer" as "a person…who operates a business in the construction industry…." It subcontracted the landscaping work at its road project to the responding party. The responding party had worked at seven other road construction

projects in 2006 as well as at various smaller construction projects. The work it did at those construction projects encompassed the installation of soil, sod, trees, shrubs, plants, etc. and hydro seeding. Such work might be fairly described as "landscaping". To the extent the responding party carried out landscaping in connection with road construction projects or other smaller construction projects, the responding party "operated a business in the construction industry" even if its principal or primary business did not involve construction work. See *Tops Marina Motor Hotel*, (1964), 64 CLLC ¶16,004; *Kapuskasing Board of Education*, [1972] OLRB Rep. June 587; *Toronto, Corporation of the City of Toronto*, [1978] OLRB Rep. Dec. 1145, application for judicial review dismissed (*City of Toronto v. Carpenters District Council of Toronto and Vicinity*, (1980), 27 O.R. (2d) 673); *Windsor Board of Education*, [1983] OLRB Rep. May 831. In *Municipality of Metropolitan Toronto*, [1989] OLRB Rep. March 279 the Board made the following observation about the definition of employer in what is now section 126(1) of the Act when it wrote at page 288:

> The phrase "person who operates a business in the construction industry" has not been confined in application to vendors of construction services. In the final analysis, any person who employs workers to perform construction work has been treated as an employer in the construction industry for the purpose of applications for certification under the construction industry provisions of the Labour Relations Act.

In our view, the responding party, when it employed the people the applicant seeks to represent to spread topsoil at the Work Site in preparation for the installation of sod and for hydro seeding pursuant to a subcontract from Pioneer Construction, was employing people to perform construction work and was therefore an employer in the construction industry.

11. Nevertheless, as the Board observed in *The Jackson-Lewis Company Limited*, *supra* at page 1798:

> There is nothing in the wording of either section 1(1)(f) [now 1(1) construction industry definition] or section 2(c) [now 3(c)] to suggest that the terms "construction" and "horticulture" are mutually exclusive....

Although the responding party operates a business in the construction industry and is an employer within the meaning of section 126(1) of the Act, it may also be an "employer whose primary business is agriculture or horticulture" because there is some overlap between being in the business of "horticulture" and operating a business in the construction industry. See *McLean-Peister Ltd.*, [1962] OLRB Rep. Nov. 290 where the Board wrote at page 293

> We are unable to agree that the fact that the major portion of the respondent's operation is now in commercial, industrial, and institutional landscaping as opposed to residential work or nursery work can alter the fact that the respondent is engaged in cultivation or tilling and preparing a piece of ground appropriated to the cultivation of herbs (which include grass), flowers and plants. Nor can we accept the argument that because the work (or part of it) may fall within the definition of 'construction industry' as defined in section 1(1)(a) [now section 1(1)] of The Labour Relations Act, this takes it out of horticulture. It appears to us that some work on construction sites may very well be horticultural by nature. But what is important is what is being done, not where it is done.

12. The Board must therefore determine whether the primary business of the responding party is horticulture or agriculture and whether the employees who are the subject of this application are "employed in horticulture". The applicant urged the Board to take a purposive approach to interpreting the Act. It argued the construction industry provisions of the Act should be given a large and liberal interpretation while the exclusion from the Act, because it deprives the employees of their right to be represented by a trade union of their own choice, must be strictly and narrowly construed.

13. The applicant submits the Board should assess whether the employees in issue were "employed in horticulture" by reference only to what they were doing on the date this application was made because it was made pursuant to the construction industry provisions of the Act. The responding party does not accept that such a narrow focus is appropriate, but does submit that even if the Board looked only at the work those employees did on the application date it is clear they were "employed in horticulture".

14. The applicant submits the determination of whether the employees in issue were "employed in horticulture" should be assessed by reference to the nature of their employment on the application date rather than by reference to their duties and responsibilities over a broader or more representative period of time. The applicant contends the principles adopted by the Board in *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41 and *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 are applicable when determining whether a person is excluded from the Act in the context of a construction industry application for certification.

15. We note that section 3(c) uses the term "employed in horticulture" to describe a person to whom the Act may not apply, depending on the primary business of that person's employer. Section 158(2) of the Act, the section under which this application was made, refers to "a unit of employees employed in all sectors". The Board, in determining whether a person comes within the bargaining unit prescribed by section 158(2), looks at what work that person was doing on the date of application. Given that the Act uses the same term ("employed in") in both sections 158(2) and 3(c), where the issue of the applicability of Act arises in the context of an application for certification in the construction industry, the applicant submits that same kind of analysis ought to be used in resolving that issue.

16. The agreed statement of facts indicated the employees the applicant seeks to represent performed work at the sod farm and garden centre, as well as doing some snowploughing work in 2006, in addition to their landscaping duties. There was nothing before the Board establishing the amount of time during the year they were engaged in each segment of the responding party's business. For purposes of this application, and assuming without deciding that the applicant's approach to the analysis of that issue is correct, we are prepared to examine the work done by the employees on only the application date in order to determine whether the employees were employed in horticulture.

17. As we noted earlier, the employees in issue were unloading top soil from a dump truck, moving the top soil with a rubber tired backhoe to different areas and spreading the top soil with rakes. They did only that work for the entire day. The applicant submits that when the employees were doing such work, they were not "employed in horticulture" as they were not doing anything in connection with planting, tilling or cultivating. The installation of sod and hydro seeding would happen months later. The applicant did, however, concede that if the

employees in issue had been installing sod and hydro seeding contemporaneously with their work with the topsoil, the employees would have been employed in horticulture.

18. In order to determine whether the employees were employed in horticulture it is necessary to understand the meaning of that term. In *Regina v. Ontario Labour Relations Board, ex parte Cedarvale Tree Services Ltd.*, [1971] 1 O.R. 383; 15 D.L.R. (3d) 413; Wright J. of the High Court of Justice, in quashing a decision of the Board (*Cedarvale Tree Services Ltd.*, [1970] OLRB Rep. Feb. 1305) discussed the meaning of horticulture at pages 386-87:

> I have little difficulty in determining that "horticulture" means gardening and that in the statute it covers every kind of garden and garden work known in Ontario. It includes, among much else, work in ornamental gardens, botanical gardens and arboreta, tree nursery work, the development and care of civilized parks and *urban and suburban roadsides*, the care of individual shrubs and trees, topiary work, garden designs, landscaping and garden care. But it only includes those functions in connection with gardens of some kind. [emphasis added]

The Ontario Court of Appeal (*Cedarvale Tree Services Ltd. v. Labourers International Union of North America, Local 183*, [1971] 3 O.R. 832; 22 D.L.R. (3d) 40) agreed with the analysis of the term horticulture set out by Wright J. It also made the following observation about the word horticulture at page 44 (D.L.R.):

> The word of course comes from two Latin words: *hortus* -- garden, and *cultura* -- culture or cultivation. Accordingly, from ancient times the word had had a connotation involving garden or gardens....

In *McLean-Peister Ltd., supra*, the Board at page 293 reviewed the various definitions of horticulture and the other terms used in those definitions and wrote:

> Combining these definitions of cultivation and garden, horticulture may thus be defined as "The art or practice of cultivating or tilling and preparing a piece of ground appropriated to the cultivation of herbs (including grass), plants, flowers or vegetables".

Therefore, it is apparent that installing sod and hydro seeding is encompassed by the term "horticulture". An important, if not integral, element of installing sod or hydro seeding is, as the Board noted, "cultivating or tilling and preparing a piece of ground" for grass. While the work done by the employees in issue was similar, if not identical, to work done by construction labourers on a construction site, it was, in our view, horticulture work since it involved the preparation of topsoil to receive sod or grass seed.

19. We are therefore satisfied the employees of the responding party the applicant seeks to represent were employed in horticulture on the date this application was filed.

20. The remaining issue to be determined is whether the primary business of the responding party is agriculture or horticulture.

21. The four segments of the responding party's business are the garden centre, sod farm, snowploughing and landscaping. The landscaping done by the responding party was described by the parties in their agreed statement of fact as follows:

> 12. The landscaping activities performed generally consist of:
>
> (a) Installing sod and other products such as flowers, trees, shrubs, plants, soil etc. for private individuals at existing private residences;
>
> (b) Installing sod and other products such as flowers, trees shrubs, plants, soil etc. at existing commercial locations for business or landlords;
>
> (c) Providing services such as the maintenance of lawns, trees, and shrubs; spraying of herbicides; and designing the landscaping for either private residences or businesses; and
>
> (d) Installing sod and other products such as flowers, trees, shrubs, plants, soil etc. related to construction sites.
>
> 13. After the installation of sod and other products, the Employer often provides a warranty to its customers to maintain the sod and products for 30 to 60 days for sod and up to one year for trees and shrubs. This work is largely related to the installations at construction sites, though may apply at other installations on a case by case basis.
>
> 14. In addition to the maintenance activities outlined in paragraph 13 above, the Employer also engages in ongoing landscape maintenance unrelated to past installations including mowing of lawns, spraying herbicides, trimming trees and shrubs and caring for flowers and plants. The majority of this work is on existing commercial sites, though it is performed for private residential customers as well.
>
> 15. For the sake of clarity, when performing landscaping activities the Employer is not regularly engaged in the installation of walkways, retaining walls, driveways, sidewalks, etc., but may perform this work from time to time. For example, the Employer performed one project including this work in 2006. The landscaping activities of the Employer are generally limited to the installation and/or maintenance of lawns, shrubs, trees, plants, etc.. When installing sod, the Employer often deposits and spreads a layer of finish topsoil for the sod to root in, but this does not generally alter the grading which has already been performed prior to the Employer's engagement.

22. The parties also set out a table of hours worked and the percentage of total hours worked for each segment of the responding party's business. The garden centre, including repair and maintenance of the employer's equipment and incidental installations of trees, shrubs and plants, occupied 35% of the total hours worked by the responding party's employees. The sod farm occupied 19% of total hours worked by the responding party's employees. The hours worked by employees engaged in snowploughing was 6.5% of the total hours worked by the responding party's employees. All of the responding party's landscaping work was described as including: maintenance of lawns, trees and other products (trees, shrubs, plants, etc.) at existing locations; hydro seeding; installation of sod and other products (trees, shrubs, plants, etc.) at

existing sites; maintenance of lawns, trees and other products (trees, shrubs, plants, etc.) after installation at construction sites and installation of soil, sod and other products (trees, shrubs, plants, etc.) related to construction sites. The landscaping work related to construction sites, including hydro seeding involved 20% of the total hours worked by the employees of the responding party. The balance of the landscaping work done by the responding party at existing residential and commercial premises occupied just over 19% of the total hours worked by the responding party's employees.

23. Those facts lead us to conclude that 20% of the responding party's business, based on hours worked by its employees, was work in the construction industry, albeit landscaping work. When that construction industry landscaping work is taken together with the non-construction landscaping work done by the responding party, such landscaping work amounts to just over 39% of its business, based on the hours worked by the employees.

24. We are prepared to assume that both the garden centre and snowploughing are not directly related to the art of cultivation or tilling and preparation of land for cultivation of plants and trees and therefore those two segments of the responding party's business cannot be considered horticulture. The sod farm is agriculture or horticulture and the landscaping work undertaken by the responding party, given that it involves seeding, installing and maintaining grass, trees, plants, and shrubs whether in the construction industry or at existing premises is clearly, in our view, horticulture. The landscaping segment of the responding party's business (39% of hours worked) taken together with its sod farm (19% of hours worked), indicates to us that a significant majority of its business, based on the hours worked in those two segments, is devoted to agriculture or horticulture.

25. There are different kinds of activity that comprise the responding party's overall business. The responding party must satisfy us that its "primary business" is agriculture or horticulture. The applicant contends the term "primary" means the first of various elements, or first in a series or sequence. The Concise Oxford Dictionary defines primary as "of the first in importance, chief." The applicant argues the garden centre, which is a discrete element of the responding party's business is its principal undertaking. The applicant suggests that while the sod farm is agriculture or horticulture, the garden centre is not, and that discrete activity was 35% of the responding party's business, based on hours worked by employees. The garden centre, the applicant submits, is the most important part of the responding party's business, and as the garden centre is not horticulture, the primary business of the responding party cannot be horticulture.

26. The applicant asks us to look at the overall business of the responding party. It seems to suggest the construction activity of the responding party, that is, landscaping associated with construction sites, which comprised some 20% of its business based on hours worked by employees, ought not to be considered part of its horticulture business when assessing whether its primary business is horticulture. We disagree. Although the responding party carries on business in the construction industry when it is doing landscaping work associated with a construction project, that landscaping work can also be considered the business of horticulture.

27. In our view, the landscaping segment of the responding party's business is clearly, based on the submissions of the parties and their agreed statement of fact, a horticulture business. The landscaping work, whether associated with a construction project, maintenance after the completion of a construction project, or ongoing maintenance or installation at an existing garden

area, is horticulture work. The landscaping, when put together with the sod farm, comprise almost 59% of the business activity of the responding party based on the hours worked by its employees. That is, agriculture or horticulture involves just under 59% of the responding party's business activity. That degree of business activity, when compared to the other elements of the responding party's business that are neither agriculture nor horticulture, suggests to us the "primary", or in the words of the Concise Oxford Dictionary "of the first importance, chief", business of the responding party is the business of agriculture or horticulture. That is, horticulture or agriculture, taken together, comprise the most important or principal component of the responding party's business.

28. In the result, we are satisfied, notwithstanding the responding party carried on business in the construction industry and the employees the applicant seeks to represent were employees working in the construction industry on the application date, the primary business of the responding party is horticulture or agriculture and the employees who are the subject of this application were employed in horticulture by the responding party on the day this application was made.

29. Neither party commented upon nor raised any issue with respect to the validity of section 3(c) of the Act in light of section 2(d) of the *Canadian Charter of Rights and Freedoms* and the decision of the Supreme Court of Canada in *Dunmore v. Ontario (Attorney-General)*, [2001] 3 S.C.R. 1016.

30. Since section 3(c) of the Act provides that the Act does not apply to the employees of the responding party who are the subject of this application, this application must be dismissed.

31. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

32. The applicant in Board File No. 2469-06-U, an application filed by the responding party in this proceeding alleging violations of the Act in relation to the collection of membership evidence, among other things, is directed to advise the Board and the applicant in this application within 10 days of the date of this decision, whether it wishes to have the Registrar list the application in Board File No. 2469-06-U for hearing. If no request is made within that 10 day period, the application in Board File No. 2469-06-U will be dismissed without further notice to the parties.

3296-06-G Labourers' International Union of North America, Local 506, Applicant v. **E.S. Fox Construction Ltd.**, Responding Party.

Construction Industry Grievance – Evidence – The Labourers grieved the lay-off of the entire complement of "referred members" on a job-site, that left only "name-hires" as part of the employer's work crew – The Board examined the language of the collective agreement which advocated a 50/50 rule – The Board found the employer had no explanation (reasonable or otherwise) for the manner in which it laid off the employees,

therefore it had violated the lay-off provision of the collective agreement – With respect to the subsequent recall of one employee, the Board held that a "name-hire" or "referred employee" retains his or her status for the period in the collective agreement during which the employee can be recalled (i.e., a referred employee cannot be laid off and then re-hired within the relevant period as a name-hire) – Grievance allowed, matter remitted to parties to fashion appropriate remedy

BEFORE: *David A. McKee*, Vice-Chair, and Board Members *G. Pickell* and *A. Haward*.

APPEARANCES: *Elizabeth Mitchell*, *Peter Treacy*, *Carmen Principato* and *Rick Fleming* for the applicant; *W. McNaughton* and *C. Cimek* for the responding party.

DECISION OF THE BOARD: March 22, 2007

1. This application is a referral of grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). It arises from the layoff of eight union members from employment on January 3, 2007. The applicant, Labourers' International Union of North America, Local 506 ("the Union") alleges that the employer, E.S. Fox Construction Ltd. ("Fox") has violated provisions of the Provincial Collective Agreement between the Labourers' Employer Bargaining Agency and the Labourers' International Union of North America, Ontario Provincial District Council that apply specifically to Local 506. In particular, the Union alleges that Fox violated Article 3.04 of the Local 506 Schedule in the manner in which it laid off certain employees on January 3, 2007. The Union does not dispute that the lay-offs were necessary. However, it does assert that Fox violated Article 3.04 by retaining in employment those persons who had been "name-hired" by Fox at earlier times and laying off all those persons who had been referred by the Union from its hiring hall.

The Facts

2. Fox employed a large workforce dismantling the Petro Canada plant in Oakville. This plant had been sold to a purchaser in Pakistan and was to be disassembled and shipped to that country, to be reassembled there. No formwork was involved in this disassembly work. Fox employed a large workforce, which included up to 30 labourers at a time.

3. On January 3, 2007, the number of labourers in the employ of Fox was 16. They had been hired at various dates between July 8, 2005 and August 30, 2006. Of those 16 persons, 8 of them had been "name-hired" (that is, requested by name from the hiring hall) and 8 of them were "referred members" (that is, persons chosen by the Union and sent from the hiring hall to Fox in response to a request for one or more labourers to work on the site). The parties used various terms to distinguish between these two groups of people, including "pick" and "take"; for clarity and consistency we will use the terms "name hire" and "referred member" throughout this decision.

4. On January 3, 2007, Fox laid off nine labourers. Within that group, eight were referred members and one was a labourer who had been name-hired. Fox was then left with a workforce of seven labourers, all of whom had been name-hired. Three more labourers were laid

off on January 7, reducing its workforce to four. Although we did not hear specific evidence, it appears that the workforce has not changed since that time.

5. There are two other factual issues, the relevance of which was disputed by the parties. We ruled that we would hear the evidence and determine whether it had any relevance at the end of argument. The first fact is that on January 5, 2007 the Union filed a grievance with respect to the lay-off. On the same day, the business representative, Mr. Peter Treacy, spoke to Mr. Cimek, of Fox, about the lay-off. This conversation did not resolve anything. Later that day, Fox sent a request to Local 506, asking it to send a labourer named Leonard Johnson to the site. Leonard Johnson had been one of the referred members who had been laid off on January 3. The Union refused to do so unless Fox also took another member of Local 506 chosen by the Union from the hiring hall. The Union's position was that Leonard Johnson was no longer a referred member, but that in asking that he be returned to the jobsite, Fox was making a "name hire" and was therefore obliged by Article 3.02 of the collective agreement to employ someone from the list. Fox refused to do so and Mr. Johnson did not commence work.

6. The second factual issue related to the contents of the conversation referred to above. Mr. Treacy said that at one point Mr. Cimek became angry and said that if the Union did not like the manner in which Fox laid off members of the Labourers' Union, it would lay off three more. In fact, Fox did lay off three more people, two days later. We draw no conclusions from that evidence. No doubt, Mr. Cimek's statement simply reflects his impatience with the Union's position. The Union did not grieve the later lay-off of three further labourers, and as of February 16, 2007, the date of the hearing, they had not been replaced. We conclude, therefore, that the lay-off was for operational purposes only.

7. With respect to the evidence about Leonard Johnson, we agreed to hear the evidence and argument about its relevance before ruling on it. We concluded that we could not deal with the employer's argument without hearing the evidence, and that therefore it was not proper to exclude it. In the end, we do not accept the employer's argument with respect to the relevance of the attempted recall of Mr. Johnson to the issue of whether or not it violated the collective agreement on January 3, 2007. However, the evidence is relevant to the issue of damages, and since the parties argued the matter fully before us, we will deal with that issue in this decision.

The Collective Agreement

8. The relevant provisions of the collective agreement are as follows:

> **ARTICLE 3 – HIRING**
>
> ...
>
> 3.02 Where an Employer wishes to hire additional labourer(s), the Employer shall contact the Local 506 Union Hall to request the referral of such labourer(s). At the time of placing the request, the Employer shall be entitled to name one-half of the number of labourers requested, subject to the following conditions:
>
> (a) the labourer(s) requested is a member(s) in good standing of Local 506;

> (b) the member is unemployed as a result of voluntary recognition and has been registered on the out-of-work list for two (2) weeks or more;
>
> (c) where the Employer requests an odd number of labourer(s), the odd numbered labourer(s) may be named by the Employer only with the consent of the Union.
>
> Such consent will not be unreasonably denied.
>
> 3.04 Notwithstanding the fifty percent (50%) ratio provided for herein, the Employer shall be free to rehire any employee who has been in their employment in the previous four (4) months provided they are still members in good standing of the Local Union and they are unemployed and registered on the work referral list. Where the Employer exercises such recall rights, the Employer shall be required to apply the 50/50 rule at the point in time when orders are placed for the recall of workers. The Employer and the General Contractors' Section of the Toronto Construction Association will do everything possible to ensure that layoffs are not used to abuse the Employer's fifty percent (50%) name hire rights.
>
> 3.05 *Employers engaged in Formwork pursuant to this Schedule will be entitled to four (4) months of recall rights without applying the 50% ratio as found in Article 3.*

The Theories of the Two Parties

9. The theories of the two parties are as follows. The Union alleges that Fox violated the last sentence of Article 3.04 in its choice of whom to lay off on January 3, 2007. In the Union's submission, the employer was obliged to maintain, at least roughly, a 50/50 ratio between the name-hires and the referred members. In laying-off only the referred members, Fox was in breach of its obligations under Article 3.04.

10. Fox's position is that Article 3.04 only obliges it to maintain a sort of general equilibrium between name-hires and referred members over a lengthy period of time. It acknowledges that the lay-off of all of the referred members on January 3, 2007 put the ratio "out of balance". Fox asserts that it had a period of time within which to correct that balance, and that it attempted to do so by recalling Mr. Johnson pursuant to the recall provisions of Article 3.04, but was frustrated by the Union.

11. The Union's argument in response is that the Collective Agreement contains no right of recall. The attempted recall of Mr. Johnson occurred after the initial lay-off and therefore is irrelevant to the question of whether or not the lay-off constituted a violation of the collective agreement. In any event, when Fox attempted to recall Mr. Johnson, it could only do so under Article 3.02. In doing so, Fox would was attempting to "name hire" Mr. Johnson and that, had he returned to the workforce, he would have done so as a "name-hire". Therefore, Article 3.02 required Fox to employ, at the same time, a member referred from the list.

Extrinsic Evidence

12. Certain portions of the last sentence of Article 3.04 are patently ambiguous. The term "will do everything possible" and the word "abuse", are sufficiently ambiguous to justify the admission of extrinsic evidence. In seeking to clarity that ambiguity, the Union called

Brian Foote. Director of Labour Relations of the General Contractors' Section of the Toronto Construction Association ("TCA") since 1977.

13. Mr. Foote has been chief spokesperson for the Toronto area contractors bound to the Labourers' Provincial Collective Agreement since the inception of provincial bargaining. Mr. Foote's evidence was very helpful in demonstrating that the parties agreed to deliberately ambiguous language in drafting Article 3.04.

14. Before 1986. the Local 506 Appendix required 100% of an employer's workforce to be referred from the hiring hall. There was no provision for name-hires. In 1986. the TCA sought a 100% name-hire regime and settled (not surprisingly) for a 50/50 ratio. The Union was prepared to grant some name-hire rights. but wanted assurances that the ratio would be maintained for the length of the job. and particularly would apply at the time of lay-off. In response. the TCA was concerned that a rigid application of the 50/50 rule at the time of layoff would lead to something analogous to pure seniority. a practice which it viewed as "not positive". Accordingly. it attempted to identify the Union's concern about how an employer might "abuse" the right of name-hiring.

15. Mr. Foote's evidence about what was discussed related to what the parties would have regarded as "abuse". The example of "abuse" he gave was of an employer who name-hires four labourers and takes four labourers referred from the hall. and then promptly lays off the four persons referred from the hall. leaving him with a workforce composed exclusively of persons who have been name-hired. However. Mr. Foote also agreed that the same concern was expressed at the point of a major slowdown of a project. The compromise the parties reached was the last sentence of Article 3.04. Mr. Foote testified that the parties agreed to the language of the compromise without seeking to define precisely what that meant. Essentially. the lay-off would not be conducted on the basis of a rigid 50/50 ratio. but would generally observe that pattern. When asked in cross-examination if an employer might have time to "re-balance" its forces as between name-hires and referred members. Mr. Foote agreed. but stated that he could not say that there was any agreement about the time during which such re-balancing should occur.

16. In a communication to members of the TCA with respect to this Article. the TCA expressed the following opinion as to what it had agreed to:

> *Hiring (New Article) Toronto Local 506 and Simcoe Local 506*
>
> ... With this first agreement by Local 506 to formally acknowledge the right of employers to name-hire. the General Contractors' Section have committed to do everything possible to ensure that the intent of the 50 percent name-hire provisions of the Memorandum are honoured. In this regard. the Union has concerns that layoffs may be used artificially to eliminate workers referred by the Union under the above-noted 50/50 hiring provision. The Section has committed that layoffs should only be used for a normal reduction of staff as in the past.

17. The language has remained in the collective agreement ever since. although there have been other amendments with respect to other issues (the only change to Article 3.04 was to add the words "the employer" at the beginning of the last sentence).

18. The Union's evidence from two officers of Local 506 was not helpful. Much of this evidence was given in general terms and is simply not explicable in terms of the words in Article 3.04. Both witnesses, for example, testified that there were no recall rights under Article 3.04. However, the Article deals very specifically with recall situations. They also said that the opening phrase: "Notwithstanding the fifty percent (50%) provided for herein ..." was mistakenly placed in Article 3.04 and referred to employees engaged in formwork. Given the quite specific provisions of Article 3.05 regarding Formwork, this evidence makes no sense at all. They also said that the final sentence of Article 3.04 was meant to relate to the entire Article 3, not simply Article 3.04. Although nothing would appear to turn on this, Article 3.04 is the only one dealing with lay-offs. Counsel for the Union argued that this evidence was not contradicted by any other witness. The issues were not raised with Mr. Foote, who testified first. However, they are contradicted by the express language of the collective agreement, and we give no weight to that evidence.

Decision

19. The grievance must be determined on the basis of the language of the Collective Agreement applied to the facts of this case. It is not surprising that there is no evidence of a specific shared intention of what the words were to mean in this particular circumstance. The variety and nature of lay-offs over the course of a construction project are sufficiently varied that it would be impossible to take all of them into account. It is therefore necessary to give the words their most reasonable meaning in the context of work in the construction industry. To reiterate, the last sentence of Article 3.04 states:

> The Employer and the General Contractors' Section of the Toronto Construction Association will do everything possible to ensure that layoffs are not used to abuse the Employer's fifty percent (50%) name hire rights

We reject Fox's assertion that employees "lose" their character as name-hired or referred members during the course of their employment. There is no limit in time to the last sentence of Article 3.04. That sentence simply says that lay-offs shall not "abuse" the 50/50 ratio. It does not distinguish between lay-offs that occur one day, one week, or one year after hiring. Since the employer is the one who engaged in the name-hiring in the first place, it is hardly an onerous task for the employer to keep track of what it did. Therefore, we accept that the Union is correct to look at the persons who were laid off and those who were retained and to identify them as either name-hires or referred members.

20. We accept that the term "abuse" does not require a rigid lay-off in precisely the same ratio as the 50/50 hiring ratio. There may well be times when the lay-off of a group of referred members, while at the same time a group of name hires remains, does not represent an abuse. If a significant number of the referred members on a particular crew quit, that is a situation for which the employer is not responsible. Thus, subsequent lay-offs among the remaining name-hires and the few referred members who did not quit might well bear little relationship to a 50/50 ratio. There may also be operational imperatives. If a workforce is split in two between two parts of a job, and one part finishes before the other (for whatever reason), the familiarity of the crew with the work being done on the continuing part of the project may well mean that the employer is justified in laying-off the crew on the finished part of the project, regardless of what effect this has on a 50/50 ratio.

21. There are no such facts here. There is no evidence at all from the employer as to why it chose the employees it did to lay off (other than that one of the retained persons was a foreman and the other was the job steward). From counsel's brief description of the project, it was a large one, but not one differentiated into individual crews. We accept that, given that the Article does not require a rigid application of the 50/50 ratio to lay-offs, there may well be times when the crew is "out of balance" as a result of a lay-off. That cannot reasonably be expected to cover the facts of this situation. As far as the evidence discloses, Fox took no steps (as opposed to "everything possible") to ensure that the lay-offs did not "abuse" the employer's name-hire rights. In this context, the word "abuse" at the very least means something which undermines the Union's right to determine the identity of roughly half of the persons on the job. Here, with no explanation, Fox eliminated that group of people entirely. A lay-off of all of the employees who were referred by the Union from its hiring hall, with no explanation, is a violation of Article 3.04.

The Recall of Mr. Johnson

22. We have rejected the submission of the employer that the recall provisions of Article 3.04 should have permitted it to "re-balance" its workforce over time. However, it is worth dealing with the issue of the attempted recall of Mr. Johnson, as this will have an impact on remedy. The Union argued that events that occurred after the alleged violation should not affect the determination of whether or not a violation of the Collective Agreement had occurred, an argument with which, on the facts of this case, we agree. The Union argued that the Board was to remain seized with respect to any remedy, and could deal with events surrounding Mr. Johnson's attempted recall later. However, given that counsel also stated that the Union's position and argument would be the same with respect to remedy, and since remedy is a matter the parties must now discuss, there is no reason not to deal with the issue now. Since we are remitting the matter of remedy to the parties, our conclusion will, we hope, assist in reaching a conclusion without the necessity of returning to the Board.

23. Fox argued that it could recall employees who had initially been referred members, to correct the ratio of name-hired to referred members, in its workforce. The Union argued that once an employee is laid off, there is no right of recall under the collective agreement and that any subsequent re-hiring of employees had to be done under Article 3.02. In this regard, the Union relied on the evidence of Richard Fleming, the dispatcher for Local 506, and Peter Treacy, Business Representative and Recording Secretary, that there are no recall rights under the Collective Agreement. As noted, counsel argued there was no evidence to the contrary. Mr. Fleming was asked the question in reply, so that he was not cross-examined on it. Mr. Treacy's explanation that the recall provisions apply only to the "formwork" part of the Collective Agreement is difficult to reconcile with the plain wording of the Collective Agreement. In cross-examination, he appeared to agree with the proposition that recall rights did exist (though perhaps only for formwork) and that employees could be recalled as "picks" (i.e. name-hires) or "takes" (referred members), although the evidence was sufficiently unclear that we place no great weight on it.

24. The fact is that Article 3.04 deals with recall rights extensively. It is not restricted in any way to formwork employment. Indeed, Article 3.05 states that the ratio does not apply to formwork projects at all. The second sentence of Article 3.04 provides:

> "Where the employer exercises such recall rights, the employer shall be required to apply the 50/50 rule at the point in time when orders are placed for the recall of workers".

If this sentence is to have any meaning, the recalled workers must still retain their character as name-hires or referred members. Thus, not only do employees retain this particular status throughout the course of their employment up to the point of lay-off, but they continue to retain that status for the four-month period during which they may be recalled to employment.

25. Thus, when an employer recalls an employee, such recall affects the ratio of name-hired to referred members in the employer's employ. Accordingly, when Fox attempted to recall Leonard Johnson, it was attempting to mitigate the damages caused by its violation of Article 3.04 two days earlier. What consequences flow from that conclusion remain to be seen.

Conclusion

26. We find that by laying off all eight of the name-hired employees on January 3, 2007, Fox violated Article 3.04 of the Labourers' Provincial Collective Agreement. We remit to the parties the issue of what remedies are appropriate for this violation of the Collective Agreement. If the parties are unable to resolve that issue, we remain seized of the grievance to deal with it.

3700-06-R International Association of Machinists and Aerospace Workers, Applicant v. **Excel Technologies Limited**, Responding Party.

Bar – Bargaining Unit – Certification – Employee – This application for certification was filed within a year of an earlier application against the same employer – Subsequent to the dismissal of the first application the employer moved its operations from Brampton to Milton (which area was not covered by the bargaining unit proposed in the first application) – Ten employees moved from Brampton to Milton and performed the same jobs – The Board found that the word "position" must be interpreted in context to avoid a result that is inconsistent with sound labour relations or the purposes of the Act – The Board found that the position of an employee is not the same unless it is with the same employer and in a geographic location covered by the scope clause of the original application – Therefore the ten employees transferred to Milton were in different positions than they held in Brampton, and they would not have been in the bargaining unit proposed in the current application had they occupied their original position – Given that the criteria set out in s. 10(3.1) had been met, the Board exercised its discretion to consider the current application since only 10 of the 30 employees at Milton had their wishes for unionization tested within the one year period and more than six months had elapsed between the two applications – Certificate issued

BEFORE: *Brian McLean*, Vice-Chair and Board Members *J. A. Rundle* and *R. R. Montague*.

APPEARANCES: *Mark Wright* and *Scott Jackson* for the applicant; *Wm. Mark Fryer* and *Mario Poce* for the responding party.

DECISION OF THE BOARD: April 30, 2007

1. This is an application for certification.

2. This decision concerns one issue: whether the application is barred under the provisions of s. 10(3) of the *Labour Relations Act, 1995* as read with s. 10(3.1). This application followed an earlier application for certification against the same employer and this application was filed within a year of the original application, which was dismissed.

The Facts

3. The employer packages and warehouses industrial fasteners and furniture components. On May 11, 2006, when the original application was filed by the union, the employer's operation was located in Brampton. The union lost the representation vote taken among employees in essentially the following proposed bargaining unit:

> all employees of Excel Technologies, in the City of Brampton, Ontario, save and except, supervisors, persons above the rank of supervisor, office and sales staff.

4. The original application was dismissed by decision dated June 26, 2006.

5. Subsequent to the dismissal of the original application the employer moved its operations to Milton. There is no doubt that Milton, and thus the new location, is not within the City of Brampton or otherwise covered by the bargaining unit proposed in the original application.

6. About ten employees moved from the Brampton location to the Milton location. They all perform the same jobs at Milton as they had at Brampton. In addition, there are 20 employees at Milton who were not working at Brampton at the time the first application was filed.

7. On February 26, 2007 this application was filed. The employer objected, claming that this application was barred. The Board ordered a representation vote, the ballots were counted and employees voted in favour of representation by the applicant. Accordingly, the bar issue is the only thing that prevents the union from being certified.

The Issue

8. The relevant provisions of the *Labour Relations Act, 1995* (the "Act") are as follows:

> **10.** (3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is dismissed.
>
> (3.1) Despite subsection (3), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a

> bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if.
>
> (a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made: and
>
> (b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

9. For the purposes of this decision I assume, without finding, that s. 10(3) applies. Therefore, a determination of this issue depends on the interpretation of s.10(3.1).

10. In *Greenvilla Homes and/or Greenvilla Homes Corp. and/or Greenvilla Development Group Inc. and/or Greenvilla Homes (Greenvilla Development Group Inc.)*, [2005] OLRB Rep. March/April 299 (March 21, 2005), the Board described s. 10(3.1) as follows:

> 21. There are two conditions described in s. 10(3.1) which must apply for the exception to the bar under s. 10(3) to be effective: (a) the position of the employee in the original application must be different from their position at the time of the new application: and (b) the employee would not be in the bargaining unit proposed in the new application if they still occupied their original position when the new application is made.
>
> 22. In *Bayview-Wellington Homes Inc.*, the Board described various scenarios in which s. 10(3.1) might be considered. The second of these, at ¶30, was the following:
>
>> 30. The second scenario is that the original application and the new application propose different bargaining units and at least one of the employees in the two bargaining units proposed is the same. In that case, the exception set out in Section 10(3.1) may apply and the Board may exercise its discretion not to impose a bar. The exception would apply if (a) the employee's position had changed between the time the original application was made and the time the new application was made: and (b) that change meant that the employee would not have been in the bargaining unit proposed in the new application had he/she still occupied the former position when the new application was made. If the exception does not apply, the statute imposes a bar.

11. The union's argument in this case is that the word "position" must be interpreted with reference to an employee's employer and workplace. Only an employee in the same job with the same employer in the same workplace or within the geographic scope covered by the collective agreement is in the "original position". It relies on *Greenvilla, supra,* where the Board stated:

> 34. Clearly, as was explained in *Smid*, above, the craft being performed by a worker affects their position. Carpenters are not in the same position as labourers. But, as the Union argues, that does not describe all of what

> constitutes a position. A position is also affected, and may be changed, by where the work is performed. Not every change in worksite will result in a change of position, but, in the construction industry, a change in location from one Board Area to another will result in a change of position. In the construction industry a change in Board Area is like a change in workplace in other industries. This is because the two fundamental determinants of an employee's position in the construction industry, outside of the ICI, is their craft and the Board Area in which they are working. These two considerations inform the bargaining rights which a union may obtain.
>
> 35. Since 1962 Board Areas have constituted a fundamental notion in the construction industry. The standard, non-ICI bargaining units have, since then, been defined by Board Area. Bargaining rights outside of the ICI are limited to Board Areas. The various Board Areas were defined, over time, by evidence of a consistent pattern of collective bargaining, and once defined, they have not been readily altered. A union need not organize all the employees of an employer. It need not organize all of the areas in which the employer has employees. It may pick and choose which Board Area(s) it wishes to organize: *Primeline Plumbing Ltd.*, [2001] O.L.R.B. Rep. Sept./Oct. 1240, at 1242; *1248833 Ontario Inc. (c.o.b. Harold's Demolition & Recycling)*, [2001] O.L.R.D. No. 2947, at ¶¶18-21; *Dagmar Construction Limited*, [1987] O.L.R.B. Rep. Apr. 480, at ¶12. The importance of the division between Board Areas is such that if a worker works in one Board Area, and then in another, the worker will be treated by the Board as working in two different positions. The fact that Board Area 9 is adjacent to Board Area 8, and that the work sites affected in the two certification applications are near to each other, are not relevant considerations.
>
> 36. This is not to say that every change in work location results in a different position; only a change of Board Area will do so in the construction industry, as will a change of sector or craft. The absurd result suggested by the Employer will not occur because a worker working in a particular craft within the same Board Area, though at different worksites, will not be treated as being in a different position. What is relevant is the relative scope of the two bargaining units in the first and second certification applications. If there is overlap between the two bargaining units (e.g. if a Board Area is common to the bargaining unit proposed in the original application and in the subsequent application), then the employee will not be in a different position. This determination can be made without determining the actual location where the employee worked previously. It will be sufficient to know that the worker fell within a bargaining unit which encompasses (or is encompassed by) the bargaining unit in the subsequent application. If there is no overlap, as in this case, then the position will be different.

12. The employer argues that the word "position" means just what it says. Ten of the employees affected by this application were employees of this employer and were subjects of the original application. They work in the same positions as they held prior to the move. They are some of a group of employees that have already made their wishes with respect to organization known and they, and the employer, are entitled to a period of repose, which is the purpose of s. 10(3) of the Act. (See *Ontario Lottery and Gaming Corp (c.o.b. Windsor Racetrack Slots)* [2001] OLRB Rep. Mar./Apr. 532).

13. The employer argues that *Greenvilla* is entirely distinguishable because that case dealt with the construction industry. Indeed, the decision has numerous references which make it clear that the special circumstances of the construction industry dictated the result.

Decision

14. In our view, the word "position" in s.10(3.1) must be given context to avoid a result that is inconsistent with sound labour relations and the purposes of the Act. The position of the employee is not the same unless it is with the same employer and in a geographic location which is covered by the scope clause of the bargaining unit proposed by the union in the original application. In this case, we are satisfied that the ten employees who were transferred to Milton are in different positions than they held in Brampton and they would not have been in the bargaining unit proposed in this application had they occupied their original position.

15. This conclusion is reached through an analysis of the statute and is dictated so as to avoid an interpretation which in some circumstances makes no labour relations sense. In considering s.10(3.1) it is important to recognize that all bargaining units have a geographic scope which may range from a workplace to the province. Therefore, one of the ways that an employee "would not have been in the bargaining unit proposed in the original application" is if the employee is no longer in the geographic area covered by the scope clause of the collective agreement.

16. Were the result otherwise, there could be absurd results. For example, if an application for certification filed for a group of employees at a grocery store in Kenora was dismissed and an employee of that Kenora store were to move to Ottawa, obtain employment at a grocery store owned by the same employer there, in the same job, then the bar would apply to the Ottawa store. That could not possibly have been the intention of the Legislature. Indeed, an interpretation of the word "position" which equates a position with a job could result in the bar even applying to different, independent employers after an employee changes employers.

17. We are satisfied that the reasoning in *Greenvilla, supra* with respect to this point is entirely applicable to a non-construction application for certification. The geographic limits in the scope clause of a bargaining unit description are equally important in a non-construction setting as they are in a construction setting.

18. The employer's argument with respect to the purposes of s. 10(3) must be given serious consideration. However, (and leaving aside the interpretation to be given to s. 10(3)) those concerns can inform the exercise of the Board's discretion whether to impose a bar. For example, should an employer simply move across the street (and outside of a proposed site specific bargaining unit in the original application) and maintain the identical employee complement, such facts may well cause the Board (again leaving aside the interpretation of s.10(3)) to exercise its discretion not to consider a new application within the twelve month period.

19. In this case, however, only 10 of the 30 employees at the Milton location have had their wishes for unionization tested within the one year period. In addition, more than six months elapsed between the first and second applications. Under these circumstances, it is in our view inappropriate to impose a bar.

20. Having regard to the agreement of the parties, the Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

> all employees of Excel Technologies Limited, in the Town of Milton, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.

21. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

22. A certificate will issue to the applicant.

23. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

24. Meeting and hearing dates set previously are hereby cancelled.

25. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until the date that had been set for the hearing.

3886-06-R Labourers' International Union of North America, Local 625, Applicant v. **Gagnon Demolition Inc.**, Responding Party.

Certification – Construction Industry – Practice and Procedure – The responding party delivered its response to the union in a timely way, but failed to file a timely response with the Board since it had not realized that its facsimile report read "Busy, no response" and was not received by the Board – The Board followed the Divisional Court's decision in *Maystar* and decided to exercise its discretion to allow the late filing on three grounds: the union consented; the union was not prejudiced since they had received the response in a timely way; and when the respondent was informed of the problem they immediately filed their response – Matter continues

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

DECISION OF THE BOARD: April 11, 2007

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act.

2. The responding party filed its response with the Board outside the time limits stipulated by section 128.1(3) of the Act and Rule 25.5 of the Board's Rules of Procedure. Instead of filing its response on March 14, 2007, the responding party filed its response, including the information required by subsection 128.1(3) of the Act, on March 16, 2007.

3. In a decision dated March 21, 2007, I directed the responding party to file submissions about why the Board should accept and rely on its late response. I also directed the applicant to respond to those submissions.

4. The responding party established that it delivered its submissions to the applicant in a timely way and attempted to file them with the Board in a timely way. However, the responding party did not realize until contacted by the Board that the facsimile delivery of its response was not received by the Board. The responding party did not realize that the facsimile report read "Busy, no response." The responding party then immediately filed its response.

5. The applicant consents to the Board accepting the late filing of the response.

6. In *Maystar General Contractors Inc.*, (2007 CanLII 8928 (ON S.C.D.C); [2007] O.J. No. 1067), the Divisional Court held that the Board had erred in interpreting section 128.1(3) as imposing a mandatory two-day deadline for filing required information. The Court determined that the Act left the Board with the discretion to relieve against the time limits.

7. Applying that analysis, I conclude that I should exercise my discretion in this case. First, the applicant consents to the Board accepting the late filing. Second, the material was delivered to the applicant in a timely way, so it has suffered no prejudice. Finally, the responding party is able to show that it intended to file its response with the Board in a timely way, and when it was informed of the problem, immediately filed its response.

8. The Registrar has certified that the applicant had been found to be a trade union in an earlier proceeding under the Act. Therefore, having regard to the Registrar's certificate and section 113 of the Act, the Board finds that the applicant is a trade union within the meaning of sections 1(1) and 126 of the Act and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 153(1) of the Act on September 30, 1983, the designated employee bargaining agency is the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council.

9. The Board finds that this is an application for certification within the meaning of section 128 of the Act and is an application made pursuant to section 158(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126 shall be brought by either,
>
> (a) an employee bargaining agency; or

> (b) one or more affiliated bargaining agents of the employee bargaining agency,
>
> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.

10. The Board further finds, pursuant to section 158(1) of the Act, that all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

11. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act, the Board is not able to determine the percentage of employees in the bargaining unit who were members of the applicant as of the date the application was filed. The Board will determine that following a Regional Certification Meeting. Representations with respect to any status dispute must be made in accordance with the directions provided in Parts II, III and IV in Information Bulletin No. 9: Status Disputes in Certification Applications in the Construction Industry.

12. The responding party is directed to post copies of this decision in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit.

13. This matter is referred to the Manager of Field Services to conduct a Regional Certification Meeting.

0400-06-U Gilbert McIntyre, Applicant v. Ontario Secondary School Teachers' Federation, District 12, Responding Party.

Duty of Fair Representation – The applicant complained that his trade union (OSSTF) violated s. 74 of the Act when it failed to provide him with a lawyer in his disciplinary proceeding before the Ontario College of Teachers – The Board held that a union's duty of fair representation is restricted to those matters arising out of the collective agreement, where the union enjoys exclusive bargaining rights *vis à vis* the employer – A hearing before the applicant's professional disciplinary body is not a matter that involves either the union or the employer; it is strictly between the individual and his/her governing body – Even when the union elects to represent the individual in such a proceeding, the union's conduct does not fall under the Board's scrutiny pursuant to s. 74 – Application dismissed

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD: March 12, 2007

1. This is an application under section 96 of the *Labour Relations Act, 1995* ("the Act") which alleges a breach of section 74 of the Act.

2. The matter has been ongoing for some time. On September 29, 2006 the applicant filed submissions in reply to a request by the responding party that the application be dismissed for failure to disclose a *prima facie* breach of the Act since his complaint relates to an alleged breach by the union of the representation of the applicant before the Ontario College of Teachers. This decision determines that issue.

3. The application alleges that the union provided a lawyer to the applicant to represent him before the Ontario College of Teachers. However, after some time the applicant dismissed the lawyer or the lawyer stopped representing him. He asserts she was in a conflict of interest and was not properly representing him.

4. The applicant submits that "any law that affects the workplace including the *College of Teachers Act* falls under the Collective Agreement according to the Weber principle". He also relies on the fact that the union website states that the union will provide legal assistance in College of Teacher complaints. He asserts that the union's failure to provide a new lawyer in connection with his College of Teacher matter is a violation of the Act because the decision was made in an arbitrary, discriminatory or bad faith manner.

5. The "Weber principle" arises out of the Supreme Court of Canada's decision in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929. In that decision the Court reviewed the Supreme Court's earlier decision in *St. Anne Nackawic Pulp & Paper Co. v. Canada Paper Workers Union Local 219* [1986] 1 S.C.R. 704 and stated:

> 43. Underlying both the Court of Appeal and Supreme Court of Canada decisions in *St. Anne Nackawic* is the insistence that the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement". Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.

6. I disagree that the Court's decision in *Weber* has any bearing on the application before me. The proceedings before the College are completely separate from the workplace relationship between the School Board and the union. The merits of a complaint to the College could not be determined by an arbitrator appointed under the collective agreement.

7. This conclusion bears on the word "representation" contained in s.74 of the Act. S. 74 of the Act states:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

8. One possible interpretation of the word "representation" of s.74 is that a union is obligated to "represent" employees in the bargaining unit in all aspects of their lives. Another, less onerous interpretation (and the one which appears to be advanced by the applicant) is that unions must represent employees in matters relating to work.

9. The Board has in its case law adopted a more restrictive interpretation. The cases hold that the union's representation obligation is restricted to matters arising out of the collective agreement. As the Board said in *Luis Lopez* [1989] OLRB Rep. May 464:

10. It is appropriate to first reflect on the history and purpose of section 68 of the Act which reads:

> > A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.
>
> While the section is couched in broad terms ("shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit"), the Board regards the duty of fair representation as restricted so that the extent of the duty is coextensive with the extent of the union's authority as exclusive bargaining agent. The duty of fair representation was enacted as a counterweight to the restrictions on individual employee rights inherent in the creation of a collective bargaining regime in which the bargaining agent was granted exclusive rights to bargain on behalf of all employees in the bargaining unit, whether or not union members. The duty of fair representation serves to protect the individual from decisions of the bargaining agent which could be characterized as arbitrary, discriminatory or in bad faith. In effect, given that the trade union would likely be more responsive to the wishes of the majority, the individual was afforded some protection against the "tyranny of the majority" since the advent of a collective bargaining regime had, for all intents and purposes, eliminated the individual's common law right to negotiate an individual contract of employment. Thus, the context in which the section 68 duty arises and its pur5pose constitute the rationale for defining the ambit of the trade union's statutory obligation to fairly represent the employees in the bargaining unit.
>
> 21. The issue of the ambit of the union's obligation under section 68 is squarely raised in the instant case. The Board concludes, for the reasons already expressed, that the duty of fair representation must be commensurate with the reach of the union's statutory authority to represent the employees in the bargaining unit. Although, in a sense, the WCB intimately affects the

relationship of employer and employee, the relevant statute, the *Workers' Compensation Act*, R.S.O. 1980, c. 539 (as am) effectively removes the adjustment of compensation for work-related injuries from the collective agreement arena by interposing an administrative agency between the worker and the employer. All claims for compensation are to be heard and determined by the WCB and, once compensation is awarded, it is paid out of an accident fund in accordance with a pre-determined scale. The trade union has no statutory role in the scheme. Hence, the union's representational duty in section 68 of the *Labour Relations Act* as exclusive bargaining agent is unrelated to the statutory scheme for workers' compensation and cannot apply to such claims: see *Eason v. Frontier Airlines, supra*, to the same effect. Accordingly, the Board finds that the union's decision not to represent the complainant at the WCAT proceeding falls outside the scope of the section 68 duty. Its decision in that regard may not scrutinized by the Board by virtue of the duty of fair representation.

22. The fact that the WCB process has an "employment" aspect is insufficient to clothe the Board with jurisdiction under section 68. This conclusion echoes the reasoning in *Sylvia Colalillo, supra*, at paragraph 4 of that decision (set out at paragraph 18 above). The B.C. Board's comment in *Registered Psychiatric Nurses' Association, supra*, at 459 is particularly apposite in this regard:

> The next branch of Morgan's complaint is the Union's failure to represent him at the coroner's inquest. The Association has argued that they were under no further duty to Morgan at this point in time since he had resigned and was no longer a member of the bargaining unit. We cannot accept this proposition. Had Morgan been discharged and a grievance sustained on arbitration, reinstatement would have restored his bargaining unit status at the time of the inquest. Similarly, had the Association's representation of him before or throughout the Hall incident been in breach of Section 7(1), and a subsequent arbitration resulted in Morgan's reinstatement, the same result would have occurred. Notwithstanding this, however, we are of the opinion that the Association had no obligation under the *Code* to represent Morgan at the inquest.
>
> The inquest was not a proceeding under the collective agreement: it was an outside proceeding. Where Section 7(1) speaks to "representation", it must be taken to mean representation in the negotiation or administration of collective agreements. Disciplinary matters and grievances come within the purview of the duty. Inquests do not. It is not enough that the outcome of the inquest might influence Morgan's employment rights. The same could be said of criminal charges, theft from an employer for example. While Section 7(10 would require fair representation of an employee discharged as a result of such a theft, it would not require the union to represent him in criminal court. A union may choose to provide representation to its member at outside proceedings such s inquests or criminal proceedings arising out of incidents during strikes, but failure to do so is not a matter which may be a breach of the duty of fair representation.

11. Following that logic, the Board has refused to find an obligation under s.74 of the Act in connection with workers compensation matters. In my view, complaints before the College are of the same variety. A complaint to the College does not arise out of the collective agreement.

12. This conclusion is the same as reached by the Board in *Bruce-Grey Catholic District School Board* [2003] O.L.R.D. No. 3081 (September 17, 2003) Board File No. 4174-02-U). In that case the applicant, among other things, took the position that the union (OECTA) breached s.74 when it ceased funding his legal representation in respect of Ontario College of Teachers proceedings. The Board held:

> 29. Finally, the Board agrees with OECTA's submission that the duty of fair representation contained in section 74 of the Act does not apply with respect to union representation of bargaining unit employees in legal proceedings other than those in which the union enjoys exclusive representation rights *vis-á-vis* the employer. See *John Kohut*, [1991] OLRB Rep. January 35; *Luis Lopez*, [1989] OLRB Rep. May 464; *Betty Lavoie*, [1981] OLRB Rep. Aug. 1098; and *Ontario Secondary School Teachers' Federation*, [2002] O.L.R.D. No. 2746. In the case of the OCT proceedings involving the applicant, the intervenor is not a party to the proceeding; rather the proceeding is a matter between an individual teacher and his professional disciplinary body (see section 32(2) of the *Ontario College of Teachers Act, 1996*.) Furthermore, OECTA is not obliged pursuant to the *Ontario College of Teachers' Act, 1996* to represent its members in disciplinary matters, nor is it obliged to do so pursuant to its constitution. The fact that OECTA may choose to represent its members in such proceedings does not mean that it becomes subject to section 74 with respect to the quality of that representation (see *Ontario Secondary School Teachers' Federation, supra*). Similarly, the fact that OECTA may represent its members in a preliminary portion of such proceeding does not create an obligation pursuant to section 74 to continue that representation for the balance of the proceeding (see *Luis Lopez, supra*). For this reason, the Board has determined that the balance of the application alleging that OECTA has breached section 74 of the Act by refusing to continuing representing the application before OCT must be dismissed.

13. The fact that the union initially represented the applicant in connection with the College proceeding does not alter that conclusion. As the Board said in *Luis Lopez*, [1989] OLRB Rep. May 464:

> 24. The Board's conclusion is not affected by the fact that the union initially represented the complainant before the WCB. That is, representation which arises outside the union's role as exclusive bargaining agent cannot generate a duty to represent pursuant to the *Labour Relations Act*. It may be that, in another forum, the union or its officers could be compelled to continue representing the complainant (or to have initially represented him at the WCB if they had declined to do so) based on the contractual relationship between a union and its members as expressed in its constitution or arising out of its conduct: see, for example, *Orchard v. Tunney* (1957), 8 D.L.R. (2d) 273; *Astgen v. Smith* [1969] 1 O.R. 129; *Foran v. Kottmeier*, [1973] 3 O.R. 102 (C.A.); and see paragraph 18 above. Whether or not an enforceable right may be established elsewhere, it is clear the union's conduct in representing the

> complainant at the WCB stage cannot subject a decision not to do so at the WCAT level to review by the Board by virtue of section 68 of the *Labour Relations Act* as such an obligation would not be coextensive with the union's exclusive bargaining authority conferred by the *Labour Relations Act* and to which section 58 scrutiny must be limited. In other words, without statutory or inherent jurisdiction to review the contractual relationship between a union and its members, as expressed in the union's constitution and bylaws, the Board cannot enforce that relationship. Nor can the Board rely on a doctrine akin to estoppel to require the union to continue its representation as a matter of equity because of the union's conduct in initially representing the complainant, when the Board lacks the jurisdiction to supervise the relationship between the union and its members beyond the confines of the collective agreement, its negotiation and administration: see *Registered Psychiatric Nurses' Association*, supra, in the passage cited in paragraph 22 above.

14. Finally, the fact that the union promises (to take the applicant's allegations at their highest) representation before the College of Teachers does not, by itself, bring this complaint within the ambit of section 74 of the Act.

15. For all of these reasons, this application is dismissed for failure to disclose a *prima facie* breach of s.74 of the Act.

1182-06-PR; 1465-06-M; 1635-06-PR Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663, Applicants v. **Greenfield Energy Centre LP and Burns and Roe Enterprises, Inc.,** Responding Parties; Canadian Union of Skilled Workers, Applicant v. **Burns and Roe Enterprises, Inc. and Greenfield Energy Centre LP**, Responding Parties v. International Union of Operating Engineers, Local 793, Ontario Sheet Metal Workers' & Roofers' Conference, I.B.E.W. Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 530, The Construction Employers Coordinating Counsel of Ontario, Sarnia Construction Association, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local 598 and Millwright Regional Council of Ontario, Intervenors; **1635-06-PR Burns and Roe Enterprises and Sarnia Construction Association as agent for Greenfield Energy Centre LP**, Applicant.

Project Agreement – Sector Determination – Standing –The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board – The Canadian Union of Skilled Workers filed a sector determination, challenging the project agreement and arguing it falls within the electrical power systems sector, as opposed

to the ICI sector – The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement – Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative – Application for sector determination dismissed

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

DECISION OF THE BOARD: March 21, 2007

1. These three proceedings relate to the Greenfield Energy Centre ("the project"), a 1,005 combined-cycle natural gas-powered electrical generation plant, located in Courtright, Ontario. The project will consist of three natural gas-fired combustion turbines, three heat recovery steam generators, and one steam turbine. A cooling tower, switchyard, administration building and warehouse are also part of the project.

2. The Canadian Union of Skilled Workers ("CUSW") has brought an application pursuant to section 166 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act") seeking a determination that the work to be performed at the project falls within the electrical power systems sector of the construction industry.

3. In a decision dated December 19, 2006, I described the two files and set out the background to the issues before the Board. I directed the filing of submissions on a number of questions:

> 4. In Board File 1182-06-PR, the Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada filed an application seeking a determination that the project could not be the subject of a project agreement, because the work fell within the electrical power systems sector. That application was brought pursuant to section 163.1(3) which provides that a bargaining agent on the list of those who are entitled to notice of the project "...may apply to the Board for an order that a project may not be the subject of a project agreement". By letter dated August 25, 2006 (but which only came to the Board's attention on December 14, 2006) the applicant withdrew that application. In the normal course, the withdrawal means there exists no timely objection that the project cannot be the subject of a project agreement.
>
> 5. The third file before the Board is 1635-06-PR. Burns and Roe Enterprises and Sarnia Construction Association as agent for Greenfield Energy Centre LP have filed documents setting out the steps the proponent has taken to establish the project agreement, as required by section 163.1. They have filed the list of bargaining agents who received notice of the proposed project agreement. They have filed evidence that the proposed agreement was approved by more than 60 per cent of the bargaining agents to whom notice was given. They have filed the notices sent to all of the bargaining agents indicating the proposed agreement was approved. They have filed notice that the project agreement is in force. I note that section 163.1(10) does not require the Board to make a declaration that a project

> agreement is in force. Section 163.1(10) says that absent a timely challenge, a project agreement comes into force upon the expiry of the time for making a challenge. The time period has long expired and no timely challenge has been made. The Board has said that it will not declare that a project agreement is in force (see *Bowater Pulp and Paper*, September 7, 2000, Board File No. 0191-00-PR). By operation of the statute then, the project agreement would appear to have come into force.
>
> 6. In the normal course, the Board would have no further involvement in this project agreement. The proponent has filed with the Board the documents that section 163.1 requires. No bargaining agent has maintained an objection that the project cannot be the subject of a project agreement. No bargaining agent has brought a timely challenge to the project agreement.
>
> 7. But we are left with the CUSW application for a determination that the project falls within the electrical power systems sector. On the face of the application, CUSW appears to be a stranger to the project. CUSW does not assert that it is a bargaining agent who ought to have received notice of the project, nor does it assert that it is a bargaining agent party to a provincial agreement. In fact, CUSW admits that it is not a designated employee bargaining agent in the ICI sector and "…its members would be denied the opportunity to work on these projects if the Project Agreement was consummated….". CUSW asserts, instead, that it has an interest in participating in proceedings that have the effect of defining the extent of the electrical power systems sector. CUSW asserts that the project is manifestly within the electrical power systems sector and seeks the Board's intervention to make that declaration.
>
> 8. My review of the file raises the three questions:
>
> (a) Can a trade union utilize the sector determination provisions of the Act to challenge a project agreement that it would not otherwise be able to challenge or object to because it is not a bargaining agent bound to a provincial agreement?
>
> (b) Does CUSW have standing to bring the application in respect of the sector determination, and what is the basis for the assertion of standing?
>
> (c) Even if CUSW has standing to bring the application, and even if the sector determination provisions can be used to challenge a project agreement by a bargaining agent who is not bound to a provincial agreement, should the Board exercise its discretion and decline to inquire into the application in respect of the sector determination in the circumstances of this case?

4. The parties have now filed their submissions. As they addressed the Board's questions specifically, it is easiest to organize my analysis around the questions.

Can a trade union utilize the sector determination provisions of the Act to challenge a project agreement that it would not otherwise be able to challenge or object to because it is not a bargaining agent bound to a provincial agreement?

5. CUSW suggests that the Board has characterized the issue incorrectly. It claims that it is making no challenge to the Project Agreement. However, it maintains that the project falls within the electrical power systems sector, not the ICI sector, and that the Act does not permit project agreements within the electrical power systems sector. Consequently, the CUSW argued, it has brought a direct request for a sector determination.

6. The parties in opposition to the CUSW submit that its position is disingenuous because, ultimately, CUSW seeks to disrupt the Project Agreement by way of the filing of a sector dispute. They argue that the project agreement provisions of the Act create a complete code permitting parties to craft agreements in an organized and expeditious fashion in respect of large-scale construction projects. To permit a collateral attack on the Project Agreement by way of sector dispute would undermine that "complete code" concept and expose project agreements to instability.

7. The other parties also dispute CUSW's assertion that the Act permits project agreements only in the ICI sector. It is not necessary to detail those submissions at this point. It is enough to say that there is a disagreement about whether project agreements can be created only in respect of the ICI sector. My only comment is that the Act does not prohibit project agreements that are not industrial projects, but the statute's process for imposing such agreements on dissenting trade unions would not apply.

8. In any event, answering this question would not advance anything. Put another way, unless and until CUSW has standing to bring the sector dispute, and unless and until the project is found to be in the electrical power systems sector, there is no need to address the Project Agreement.

Does CUSW have standing to bring the application in respect of the sector determination, and what is the basis for the assertion of standing?

9. CUSW asserts that it has a direct interest in the sector dispute and therefore has standing to bring it, or, in the alternative, if it does not have a direct interest, the Board should still entertain the dispute because it will be important for the development of labour relations in respect of future energy generating projects.

10. The parties all appear to agree that the Board has typically demanded that a party establish a direct connection before it will be allowed to participate in a sector dispute. In *Harbridge & Cross Ltd.*, [1979] OLRB Rep. April 313, the Board defined direct connection as follows:

> In our view, in order for a person to have standing to participate in a proceeding under [section 166] such a person is required to have a direct connection with the project wherein the question arises or will arise. A direct connection is possessed by a person who employs employees who are working or who will work on the project; trade unions or councils of trade unions which have bargaining rights for employees who are working or who will work on the project; and employer bargaining agencies, employee bargaining agencies and affiliated bargaining agents which represent the

> employers, trade unions or employees previously referred to in this paragraph.

11. I adopt the same test. CUSW asserts that it has a direct connection because, at some point, Hydro One Inc. will have to connect the generation facility to the grid and CUSW members will be assigned to that work. If the work is performed as if in the ICI sector, then CUSW's collective agreement may not be applied and it will see its work go to others. The other parties assert that there is no certainty Hydro One will work on the project and even if it does, the possibility for a dispute about the applicability of CUSW's collective agreement is only speculative and not the kind of direct interest that would permit CUSW to bring a sector dispute application. What is clear, the parties in opposition to CUSW assert, is that members of CUSW are not expected to work on the project. Applying the test in *Harbridge & Cross Ltd.*, they argue, results in a conclusion that CUSW does not have a direct connection with the project about which it seeks to bring a sector dispute. Counsel for the Boilermakers, Carpenters, Cement Masons, Millwrights and Sheet Metal Workers submitted:

> ...a direct interest is definite certain interest. It makes little sense in terms of promoting labour relations stability or economic viability (purposes which underlie the project agreement provisions and the *Act* in general) to enable parties with speculative conditional interests in work to advance challenges that will have the fundamental effect of undermining the very basis upon which work is being performed and labour relations being governed. If there is no certainly that the outcome of a proceeding will have any tangible effect on a party, it cannot be said that the party has a direct interest.

12. I agree with that analysis. CUSW does not meet the test that it has a direct interest in the work of the project. Its members are not working on the project and are not expected to work on the project. Its concerns are merely speculative and to permit those speculative concerns to prevail would subject other trade unions and employers who are performing work on the project to a costly and disruptive process.

13. CUSW argued that at some point the Board will have to determine into which sector this project falls, because some party will argue that the practices developed on this project are instructive, and the Board will then have to determine the sector. That may well be. But the Board prefers to adjudicate disputes only once they have crystallized.

14. CUSW is not prejudiced if a sector dispute is not advanced at this point. As counsel opposite noted, if CUSW is able to identify a direct interest in the future, it may bring an application at that time, and can fairly argue that it is not bound by any past determinations in which it was not permitted to participate.

15. Since I answered the second question in the negative, it is not necessary to answer the third question I had posed.

16. I conclude that CUSW does not have standing to bring a sector dispute, and accordingly, its application in Board File 1465-06-M is dismissed.

17. The application in Board File 1182-06-PR is withdrawn. The application in Board File 1635-06-PR is terminated as no further action is required.

2720-06-M Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059, Applicant v. **Independent Electricity System Operator**, Responding Party.

Conciliation – Reference – The Minister of Labour asked the Board to consider whether he had the authority to appoint a conciliation officer pursuant to section 18 of the Act – With respect to the parties' relationship in one specific Board area, the parties agreed that notice to bargain had been given and there was no subsisting collective agreement between them, so the Board confirmed that the Minister had the authority to appoint a conciliation officer for the parties' dispute in that Board area – With regard to the EPSCA bargaining unit, there was agreement between the parties that the Minister had the authority to appoint a conciliation officer, but they did not agree on the existence of a current collective agreement – The Labourers argued that they had given notice to bargain on more than one occasion after the IESO was established following the 1999 dissolution of Ontario Hydro – The Board held that the communication between the parties in 2003 did not constitute "bargaining" that would have prevented automatic renewal of the existing collective agreement – A letter from a mediator confirming his acceptance of an appointment to mediate cannot be construed as a written notice from one party to the other of its desire to terminate, revise or modify a collective agreement – Similarly, the filing of an application with the Board seeking recognition of bargaining rights and a declaration regarding the applicant's rights does not amount to written notice to the other party of a desire to bargain a renewal agreement – The Board found that the only valid notice to bargain was issued in September 2006, and it would only operate to prevent the renewal of the collective agreement set to expire on April 30, 2008 – The Board rejected the Labourers' contention that the agreement ceased to operate as a matter of law because the responding party refused to recognize the union's bargaining rights – Minister has authority to appoint conciliation officer

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *L.A. Richmond* and *H. Bartlett* for the applicant; *Richard J. Charney*, *Pat Dickson* and *Daniel McDonald* for the responding party.

DECISION OF THE BOARD: March 5, 2007

1. This is a reference from the Minister of Labour to the Board pursuant to section 115 of the *Labour Relations Act, 1995* (the "Act"). The reference relates to a request made by the Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 ("the Labourers") for the appointment of a conciliation officer pursuant to section 18 of the Act.

2. The Labourers' request is in respect of the following bargaining units of employees of the Independent Electricity System Operator (the "IESO"): (1) the bargaining unit relating to the electrical power system sector described in the Labourers' request for a conciliation officer dated October 6, 2006 ("the EPSCA bargaining unit"); and (2) the bargaining unit of labourers working

in Board Area 3 described in a letter from the Labourers dated October 12, 2006 addressed to Labour Management Services (the "Board Area 3 bargaining unit").

3. It is common ground between the parties that the Labourers gave the IESO notice to bargain in relation to their bargaining rights for employees of the IESO by letter dated September 6, 2006. By letter dated October 6, 2006, the Labourers requested that the Minister appoint a conciliation officer in relation to these bargaining units.

4. The issues in the reference concern whether the Minister has the authority to make the requested appointment of a conciliation officer and, if so, the term of any collective agreement in operation between the parties. More specifically, the Minister requests answers to the following questions:

> Does the Minister of Labour have the authority to make the requested appointment of a conciliation officer?
>
> If yes,
>
> (a) Are the parties currently subject to a collective agreement?
>
> (b) If the answer to question (a) is "yes", what is the duration and expiry of the collective agreement?
>
> (c) If the answer to question (a) is "no", what could be the earliest start date of the collective agreement that would be the subject of negotiations between the parties?

Questions Posed in relation to the Board Area 3 Bargaining Unit

5. The IESO acknowledges that it is subject to the bargaining rights held by the Labourers in respect of the Board Area 3 bargaining unit having regard to the Board's decision in *Ontario Electricity Financial Corporation and Independent Electricity System Operator*, [2006] OLRB Rep. July/August 594. The IESO does not further dispute that the Minister has the authority to appoint a conciliation officer in respect of this bargaining unit.

6. Under section 18(1) of the Act, the Minister has the authority and is, in fact, required to appoint a conciliation officer, upon the request of either party, if notice to bargain has been given under section 16 or 59 of the Act. Under section 18(2), the Minister has the discretion to appoint a conciliation officer notwithstanding the failure of either party to give notice to bargain, where the parties have met and bargained. The relevant provisions of the Act read as follows:

> **16.** Following certification or the voluntary recognition by the employer of the trade union as bargaining agent for the employees in the bargaining unit, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.
>
> . . .

> **18.** (1) Where notice has been given under section 16 or 59, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> (2) Despite the failure of a trade union to give written notice under section 16 or the failure of either party to give written notice under sections 59 and 131, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> . . .
>
> **59.** (1) Either party to a collective agreement may, within the period of 90 days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.
>
> (2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).
>
> . . .

In the present case, there is no dispute that the Labourers gave the IESO written notice to bargain in respect of this bargaining unit on September 6, 2006 and that the parties subsequently engaged in bargaining. The parties further agree that there is no subsisting collective agreement in relation to the Labourers' bargaining rights for employees in this bargaining unit. As such, the Board finds that the Labourers' notice to bargain dated September 6, 2006 insofar as it relates to the Board Area 3 bargaining unit is "a written notice of its desire to bargain" within the meaning of section 16 of the Act. The Minister therefore has the authority under subsection 18(1) of the Act to appoint a conciliation officer in relation to the Board Area 3 bargaining unit and also has such authority under subsection 18(2) of the Act by virtue of the bargaining that took place between the parties after September 6, 2006.

7. The parties further agree that the earliest start date of the collective agreement that would be the subject of negotiations is April 1, 1999, the date that the Independent Market Operator (the "IMO"), the predecessor of the IESO, came into existence as a consequence of the de-merger of Ontario Hydro.

Questions Posed in relation to the EPSCA bargaining unit

(i) Positions of the Parties

8. Both parties also agree that the Minister has the authority to appoint a conciliation officer in respect of the EPSCA bargaining unit. There is however a difference between them as to whether they are currently subject to a collective agreement. The IESO takes the position that the parties are subject to a collective agreement effective from May 1, 2006 to April 30, 2008, whereas the Labourers contend that there is currently no collective agreement in operation. They do however agree that the collective agreement that was in effect on April 1, 1999 at the time of

the sale of business within the meaning of section 69 of the Act from the former Ontario Hydro to the IMO, the IESO's predecessor, was the Collective Agreement between The Electrical Power Systems Construction Association and the Ontario Allied Construction Trades Council effective from May 1, 1974 to April 30, 2000 (the "Agreement").

9. The IESO contends that the Agreement automatically renewed itself in accordance with its terms, as follows:

- on April 30, 2000 for a term expiring April 30, 2002;
- on April 30, 2002 for a term expiring on April 30, 2004;
- on April 30, 2004 for a term expiring on April 30, 2006; and
- on April 30, 2006 for a term expiring on April 30, 2008.

In this regard, the IESO refers to the following provisions for renewal at Article 34.1 of the Agreement as follows:

> 34.1 Subject to the contract reopener provision of this Article, this Agreement shall continue in force and effect for a term of twenty-six (26) years, from the first day of May, 1974 to the thirtieth day of April, 2000, inclusive, and thereafter it shall be considered automatically renewed for successive periods of two (2) years unless, at least (60) days prior to the end of any two (2) year period, either party serves written notice upon the other that it desires termination, revision or modification of any provision or provisions in this Agreement. …

The IESO argues that the Labourers did not, prior to September 6, 2006, give the IESO notice that it sought to terminate, revise or modify the Agreement and that, as a consequence, the Agreement automatically renewed itself in accordance with its terms for successive two year periods since April 30, 2000.

10. By contrast, the Labourers take the position that the Agreement either terminated on April 30, 2000 or, alternatively, by no later than April 30, 2004. The Labourers submit that the Agreement ceased to operate years ago, given that the Labourers gave the IESO "notice" to bargain contemplated under subsection 18(1) of the Act or have "met and bargained" within the meaning of subsection 18(2) of the Act. The Labourers contend that written notice to bargain was given within the meaning of subsection 18(1) of the Act when the Labourers:

> (1) set up the mediation in or about 2002 concerning the Labourers' claim to bargaining rights. (The Labourers refer to the mediator's letter dated October 1, 2002, in which the mediator accepted the appointment, as constituting notice under section 59 contemplated under section 18(1) of the Act);
>
> (2) filed the application under section 69 and 1(4) of the Act in February 2004 that was the subject of the Board proceeding in *Ontario Electricity Financial Corporation and Independent Electricity System Operator*, cited above;
>
> (3) gave the IESO written notice to bargain on September 6, 2006.

The Labourers also argue that bargaining took place within the meaning of subsection 18(2) of the Act by at least June 2003 when the parties met with the mediator appointed by the parties concerning the Labourers' claim to bargaining rights and a similar claim made by the Canadian Union of Skilled Workers ("CUSW").

11. In support of its position that the parties have "met and bargained" within the meaning of subsection 18(2) of the Act, the Labourers refer to the consensual statement of evidence concerning these mediation sessions filed with the Board in *Ontario Electricity Financial Corporation and Independent Electricity System Operator*, cited above. In it, the parties agreed that the mediation was set up for the purposes of resolving the claim of the Labourers and of CUSW to bargaining rights. Paragraph 2 of that statement reads as follows:

> 2. In the late summer of 2002, LIUNA through [Mr. Harold Bartlett, a representative of LIUNA, OPDC] and CUSW through Joe Mulhall, explored the possibility of having a mediator deal with both unions' claim to bargaining rights with the IMO [now IESO], through Pat Dickson and counsel, Harvey Beresford, and through Jules Bloch, mediator.

The Labourers state that the mediation session in June 2003 is relevant for the present purposes, since, according to that consensual statement of evidence, it was not clear to the IESO (then IMO) representatives that the Labourers were asserting bargaining rights on its own behalf rather than on behalf of CUSW until the mediation session held in June 2003. As such, the Labourers contend that, by at least June 2003, the parties "met and bargained" within the meaning of subsection 18(2) of the Act and that bargaining in June 2003 meets the timeline set out in the renewal clause of the Agreement of "at least 60 days prior to the end of" the expiry of the agreement on April 30, 2004. As such, according to the Labourers, even if the Agreement did automatically renew itself in accordance with its terms until April 30, 2004, the Agreement did not automatically renew itself beyond that date given the bargaining that took place between the parties in June 2003.

12. The Labourers further argue, in the alternative, that the Agreement did not automatically renew itself after April 30, 2000 because the IESO did not accept that the Labourers had bargaining rights. According to the union, where one party does not acknowledge the union's bargaining rights and says it is not a successor, it cannot rely on the automatic renewal clause in the collective agreement to suggest that the collective agreement continued to renew itself automatically throughout the intervening period. The Labourers submit that a collective agreement will not automatically renew itself four times simply because the employer refuses to recognize the union's bargaining rights.

13. The Labourers also refer to the following Board decisions for the proposition that the Board will not accept that a collective agreement has renewed itself on more than two occasions: *G.S. Wark Limited*, [1996] OLRB Rep. September/October 811; *The Belleville and District Builders' Exchange*, [1963] OLRB Rep. May 114 in Board File No. 5901-63-C; *Cooksville Steel Limited*, [1974] OLRB Rep. June 365; *R. Reusse Co. Ltd.*, [1988] OLRB Rep. 523; *Canada Blue Tanning Company*, [1988] OLRB Rep. May 439; *Wire Rope Industries Ltd.*, [1987] OLRB Rep. December 1613. The Labourers therefore argue that the Board should not accept that four automatic renewals occurred in this case. Finally, the Labourers suggest that a review of the statutory scheme reveals that, where the Minister has the authority to appoint a conciliation officer under section 18 of the Act, there can be no collective agreement in operation given the

conciliation officer's obligation to endeavour to make a collective agreement within 14 days after his/her appointment.

(ii) Did the alleged "bargaining" in June 2003 prevent further automatic renewal of the Agreement after April 2004?

14. Even if the Board were to accept the Labourers' somewhat doubtful contention that the parties engaged in "bargaining" within the meaning of subsection 18(2) of the Act when they met in June 2003 at a mediation session held in order to resolve the Labourers' claim to bargaining rights, subsection 18(2) of the Act does not, in any event, address the termination or renewal of a collective agreement. That provision refers only to the circumstances when the Minister may appoint a conciliation officer at the request of either party. As previously noted, the IESO does not dispute the Minister's authority to appoint a conciliation officer having regard to the fact that the parties have "met and bargained" within the meaning of that provision (although it refers in that regard to the bargaining that took place in the period after the Labourers gave it notice to bargain on September 6, 2006). Given that subsection 18(2) of the Act does not deal with the issue of when a collective agreement ceases to operate, the fact that the parties have "met and bargained" within the meaning of that provision does not prevent further automatic renewals of the Agreement.

15. The renewal provision in the Agreement at Article 34.1 thereof also does not, as the Labourers' acknowledge, refer to "bargaining" as something which would deactivate the automatic renewal of the Agreement. Article 34.1 is clear that "...it shall be considered automatically renewed for successive periods of two (2) years unless, at least (60) days prior to the end of any two (2) year period, *either party serves written notice upon the other that it desires termination, revision or modification of any provision or provisions in this Agreement*" [emphasis added]. Bargaining between the parties at a mediation session or otherwise is not "written notice" of anything and therefore cannot operate to prevent the automatic renewal of the Agreement in accordance with its terms.

16. The Board therefore rejects the Labourers' contention that the "bargaining" that took place between the parties in June 2003 had the effect of preventing any further automatic renewal beyond April 30, 2004.

(iii) Did the Labourers provide the requisite written notice necessary to prevent further automatic renewal of the Agreement?

17. The Labourers point to the fact that, under subsection 69(3) of the Act, a trade union has the right to give notice to bargain to the person to whom the business was sold until the Board otherwise declares and suggests that both the IESO and the Labourers had the right to give each other notice to bargain since 2000. The Labourers however note that, while section 69 and 1(4) litigation is ongoing, neither party will give notice to bargain, since under subsection 69(9) of the Act an employer is not required to bargain until the Board has disposed of the application. As such, the Labourers contend that a trade union will generally give notice to bargain only once the Board has issued its declaration, at which point the employer is required to bargain. Subsection 69(3) and (9) of the Act read as follows:

> **69. (3)** Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 16 or 59, sells his, her or its business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 16 or 59, as the case requires.
>
> . . .
>
> **69. (9)** Where an application is made under this section, an employer is not required, despite the fact that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

Subsection 69(9) of the Act relieves the employer of the obligation to bargain with the trade union while a section 69 application is ongoing *despite the fact that a notice to bargain has been given by a trade union*. Subsection 69(9) of the Act does not prevent a trade union from giving notice to bargain while such an application is ongoing. In fact, it specifically contemplates that a trade union may have given written notice to bargain. In addition, subsection 69(3) of the Act makes clear that the trade union has the right to give "written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation" to an employer alleged to have acquired the rights, privileges and duties of its predecessor before a declaration under section 69 of the Act has issued. There is therefore nothing in the statute that requires a trade union to wait until after the Board has disposed of an application under section 69 of the Act before giving the employer written notice to bargain. Even though the employer would not be required to bargain at that time, such notice could serve to deactivate the automatic renewal provisions in the collective agreement.

18. In the present case, the Labourers, in fact, allege that such notice was given both before and after the Board disposed of its section 69 and 1(4) application. There is no dispute that the Labourers provided the IESO with written notice to bargain on September 6, 2006, which was after the Board's decision. That notice would however only operate to prevent a further automatic renewal of the Agreement, if the Agreement continued to operate in the two (2) year period ending April 30, 2008. In order to determine whether the parties are, as the IESO alleges, currently bound to a collective agreement, the Labourers' contention that it also gave written notice to bargain on two earlier occasions (being in October 2002 and again in February 2004) such that the Agreement ceased to renew itself automatically beyond April 30, 2004 remains to be considered.

19. In the Board's view, the suggestion that the mediator's letter dated October 1, 2002 (confirming acceptance of his appointment) is a "written notice" contemplated under Article 34.1

of the Agreement is untenable. Firstly, the mediation itself related to the dispute between the parties concerning the recognition of bargaining rights and was not convened for the purpose of terminating, revising or modifying the terms of the Agreement. More importantly, however, both section 59 of the Act and Article 34.1 of the Agreement contemplate that the required written notice must be *from either party to the agreement to the other party*. A letter from a mediator appointed by the parties confirming his acceptance of an appointment to mediate cannot be construed as a written notice from one party to the other of its desire to terminate, revise or modify a collective agreement.

20. The Labourers also refer to the fact that, when mediation failed, it sought to have its bargaining rights recognized and ultimately to obtain a collective agreement by filing an application under section 69 and 1(4) of the Act in February 2004 (which application was the subject of the proceeding in *Ontario Electricity Financial Corporation and Independent Electricity System Operator*, cited above). The Labourers suggest that the filing of that application should be construed as notice to bargain a renewal agreement. In that application, the Labourers sought a declaration that there had been a sale of business within the meaning of section 69 of the Act from the former Ontario Hydro to the IESO and that the IESO thereby became bound by various collective agreements binding the Labourers and the former Ontario Hydro. The Labourers also sought a declaration that it was *entitled* to give notice to bargain regarding those collective agreements.

21. In the Board's view, the filing of an application with the Board seeking recognition of bargaining rights and a declaration regarding the applicant's rights does not amount to written notice to the other party to a collective agreement of its desire to bargain a renewal agreement. In addition, if the Board were to interpret the mere filing of a section 69 and 1(4) application as notice to bargain in every case, a party that sought only recognition of its bargaining rights but did not wish to revise or terminate its existing agreement at that time would not be able to do so. The Board does not therefore accept the Labourers' contention that the filing of its section 69 and 1(4) application should be construed as notice that it was seeking the right to renegotiate a collective agreement. In all the circumstances, the Board is unable to find that the Labourers gave notice to bargain in February 2004 as alleged.

22. The Board therefore concludes that the only written notice to bargain provided by the Labourers to the IESO in relation to the Agreement was given on September 6, 2006. As noted, that notice to bargain would only operate to prevent a further automatic renewal of the Agreement after April 30, 2008.

(iv) Did the Agreement in any event cease to renew itself automatically as a matter of law?

23. The Labourers submit, in the alternative, that as a matter of law a party disputing the existence of bargaining rights cannot rely on the automatic renewal provisions in the agreement to suggest that the collective agreement continued to rollover in the intervening period. The Labourers further argue that the statutory scheme under which a conciliation officer is appointed following the giving of notice to bargain contemplates that the collective agreement is no longer in operation. The Labourers also submit that the Board will not, in any event, accept that more than two automatic renewals of a collective agreement have occurred.

24. The Board's jurisprudence on which the Labourers rely, and which is cited above, in support of its position that the Board will not accept that more than two renewals of a collective agreement have occurred does not, in fact, stand for that proposition. Instead, all of the cases to which the Labourers refer arise in the context of a claim that a trade union has abandoned its bargaining rights. What the Board indicated in those cases is that, in assessing whether abandonment of bargaining rights has occurred, the onus will shift to the trade union to explain its inactivity in the period after the second alleged automatic renewal of a collective agreement. The Board summarized its jurisprudence in this regard in *G.S. Wark Limited*, cited above, as follows at paragraph 25:

> 25. By themselves, the automatic renewal provisions in the 1963 agreement do not assist Local 1. The Board has long considered that after the second automatic renewal such provisions are ineffective for purposes of defending against an argument that the union has abandoned its bargaining rights (see, for example, *Belleville & District Builders Exchange*, [1963] OLRB Rep. May 114; *Sandercock Construction Ltd.*, [1970] OLRB Rep. July 531; *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523). After the second such renewal, there is a positive onus on the union to satisfy the Board that it has not abandoned the bargaining rights in issue.

The Board's jurisprudence to which the Labourers refer does not indicate that there can never be more than two automatic renewals of a collective agreement. The Board simply indicated therein that the *onus* of establishing that the union has not abandoned its bargaining rights will shift to the union after the second automatic renewal. In the present case, given the Board's finding in *Ontario Electricity Financial Corporation and Independent Electricity System Operator*, cited above, that the Labourers did not abandon their bargaining rights, those cases are not of assistance to the issues under consideration here.

25. The Labourers have further offered no authority to support the proposition that a party that fails to recognize a trade union's bargaining rights cannot later assert that the collective agreement between the parties renewed itself automatically in accordance with its terms. In the present case, the parties' mutual intention that the Agreement would automatically renew itself "unless, at least (60) days prior to the end of any two (2) year period, either party serves written notice upon the other that it desires termination, revision or modification of any provision or provisions in this Agreement" is made clear in Article 34.1 of the Agreement. That could easily have occurred at any point, but did not in fact occur in this case until September 6, 2006. As a consequence, the Agreement continued to renew itself in accordance with its terms regardless of the IESO's failure to recognize its obligations thereunder.

26. Finally, the Board cannot accept the Labourers' contention that the statutory provisions dealing with the appointment of a conciliation officer imply that once the Minister has the authority to appoint a conciliation officer that there can be no collective agreement that continues to bind the parties. The Labourers refer to the provisions of sections 20 and 21 of the Act in this regard to suggest that the conciliation officer has a period of 14 days to effect a collective agreement, failing which the Minister will, in the usual case, notify the parties that he or she does not consider it advisable to appoint a conciliation board. Section 20 and 21 of the Act read as follows:

20. (1) Where a conciliation officer is appointed, he or she shall confer with the parties and endeavour to effect a collective agreement and he or she shall, within 14 days from his or her appointment, report the result of his or her endeavour to the Minister.

(2) The period mentioned in subsection (1) may be extended by agreement of the parties or by the Minister upon the advice of the conciliation officer that a collective agreement may be made within a reasonable time if the period is extended.

(3) Where the conciliation officer reports to the Minister that the differences between the parties concerning the terms of a collective agreement have been settled, the Minister shall forthwith by notice in writing inform the parties of the report.

21. If the conciliation officer is unable to effect a collective agreement within the time allowed under section 20,

(a) the Minister shall forthwith by notice in writing request each of the parties, within five days of the receipt of the notice, to recommend one person to be a member of a conciliation board, and upon the receipt of the recommendations or upon the expiration of the five-day period he or she shall appoint two members who in his or her opinion represent the points of view of the respective parties, and the two members so appointed may, within three days after they are appointed, jointly recommend a third person to be a member and chair of the board, and upon the receipt of the recommendation or upon the expiration of the three-day period, he or she shall appoint a third person to be a member and chair of the board; or

(b) the Minister shall forthwith by notice in writing inform each of the parties that he or she does not consider it advisable to appoint a conciliation board.

These provisions do not however, in the Board's view, imply that there can never be a collective agreement that continues to bind the parties where the Minister has the authority to appoint a conciliation officer under section 18 of the Act and may thereafter issue a no board report if the conciliation officer does not effect a collective agreement within 14 days. In this regard, the Board notes that section 79 of the Act makes clear that the parties will not be in a position to strike or lock out until 14 days have elapsed after the Minister has released a notice that he or she does not consider it advisable to appoint a conciliation board, *where there is no collective agreement in operation*. Subsection 79(1) also makes clear that there can be no strike or lock out while a collective agreement is in operation. The scheme of the Act does not therefore, in the Board's view, imply, as the Labourers suggested, that a collective agreement can no longer be binding on the parties where the Minister has the authority to appoint a conciliation officer under section 18 of the Act.

27. For all these reasons, the Board rejects the contention that the Agreement ceased to operate as a matter of law.

(v) What is the basis of the Minister's authority to appoint a Conciliation Officer?

28. While there is no dispute between the parties that the Minister has the authority to appoint a conciliation officer, the IESO only acknowledges that the Minister has the *discretion* to do so under subsection 18(2) of the Act and not the *obligation* to do so pursuant to subsection 18(1) of the Act. The IESO submits that the Minister's discretionary authority arises from the fact that bargaining took place between the parties in the period after September 2006. While the IESO is correct that subsection 18(2) of the Act is engaged as a consequence of the bargaining that took place between the parties after September 2006, the Minister also has the obligation to appoint a conciliation officer having regard to the provisions of subsection 18(1) of the Act by virtue of the notice to bargain given by the Labourers to the IESO on September 6, 2006.

29. In the Board's view, the notice to bargain given by the Labourers to the IESO on September 6, 2006 as it relates to the ESPCA bargaining unit is a notice within the meaning of section 59 of the Act and contemplated under subsection 18(1) of the Act. For ease of reference, subsection 18(1) and section 59 are reproduced below:

> **18.** (1) Where notice has been given under section 16 or 59, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> ...
>
> **59.** (1) Either party to a collective agreement may, within the period of 90 days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.
>
> (2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).
>
> ...

Even though the September 6, 2006 notice to bargain was not given "within the period of 90 days before the agreement ceases to operate" as contemplated under subsection 59(1) of the Act, subsection 59(2) of the Act provides that a notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 59(1) of the Act. In the present case, the renewal provision in Article 34.1 of the Agreement contemplates that notice to bargain may be given, at least (60) days prior to the end of any two (2) year period. As such, the notice to bargain given on September 6, 2006 did occur at least 60 days prior to the expiry of the Agreement on April 30, 2008.

30. The Board therefore concludes that the Minister has the authority to appoint a conciliation officer having regard to the provisions of both subsection 18(1) and 18 (2) of the Act.

Disposition

31. In summary, in relation to the Labourers' bargaining rights in respect of the Board Area 3 bargaining unit, the Board answers the questions posed by the Minister as follows:

> The Minister does have the authority to make the requested appointment of a conciliation officer.
>
> (a) The parties are not currently subject to a collective agreement;
>
> (b) Not applicable;
>
> (c) The earliest start date of the collective agreement that would be the subject of negotiations between the parties is April 1, 1999.

32. In relation to the Labourers' bargaining rights in respect of the EPSCA bargaining unit, the Board answers the questions posed by the Minister as follows:

> The Minister does have the authority to make the requested appointment of a conciliation officer.
>
> (a) The parties are currently subject to a collective agreement;
>
> (b) The duration and expiry of the collective agreement is May 1, 2006 to April 30, 2008;
>
> (c) Not applicable.

3232-06-G; 3233-06-G; 3275-06-G Millwright Regional Council of Ontario and its Local 1916, Applicant v. **Industrial Redi-Works Inc.**, Responding Party; **Industrial Redi-Works Inc.**, Applicant v. The Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Local 1916, Responding Party.

Construction Industry Grievance – Settlement – Following a Board ruling that found the employer related to another unionized company and, thereby, bound by the provincial ICI agreement, the union filed two grievances respecting the assignment of work to its members; the employer filed its own grievance, complaining that the union would not accept its existing employees into membership; all three grievances were dealt with by the Labour Management Relations Committee of the grievance procedure, with the union succeeding on all counts – The issues were referred to the Board with the union arguing the LMRC's decision was a settlement enforceable by a Board decision, and the employer stating the LMRC did not issue a decision but if it did, it could not and should not be enforced – The Board held that the actions of the LMRC did constitute a decision, the issue to be determined being its enforceability – The Board examined the language of the iterations of the collective agreement dating back to 1992 (when an LMRC decision was in dispute) and found significance in the changes in wording referring to "parties to the

collective agreement" as opposed to "parties to the grievance" – The greater precision in identifying whose rights are at stake in the LMRC decision caused the Board to reject the union's preliminary motion that the decision was enforceable as a settlement – Matter continues

BEFORE: *Mark J. Lewis*, Vice-Chair, and Board Members *G. Pickell* and *R. Baxter*.

APPEARANCES: *D. Wray* and *Andrew Dobbie* appearing for Millwright Regional Council for Ontario and its Local 1916; *Justin Diggle* and *John Detzler* appearing for Industrial Redi-Works Inc.; *Kevin Fox* for a group of employees.

DECISION OF THE BOARD: March 13, 2007

1. These are three grievances which have been referred to the Board for determination pursuant to the provisions of section 133 of the *Labour Relations Act, 1995*, O.S. 1995, c. 1, as amended (the "Act"). The applicant in both Board File Nos. 3232-06-G and 3233-06-G is the Millwright Regional Council of Ontario and its Local 1916 (the "Union") and the responding party in both of these matters is Industrial Redi-Works Inc. (the "Company" and/or "Industrial"). In Board File No. 3275-06-G the Company is the applicant and the Union is the responding party. All three of these matters were scheduled to be heard together by the Registrar of the Board.

2. In addition to the Union and the Company, counsel acting for various individual employees of the Company attended at the January 31st, 2007, Board hearing and sought to intervene. The Union opposed this intervention. However, given the primary position of the Union, dealt with below, that these grievances had been "settled", it was unnecessary, on the first day of hearing, to determine the question of the entitlement of the employees to party status which they were only seeking with respect to the "merits" of these grievances.

The Union's Preliminary Motion

3. On the first day of hearing, the Union set out its primary position by way of a preliminary motion in which it asserted that the grievances which were the subject of these referrals had been "settled". Based on the settlement, and the specific language of the Collective Agreement, the Union took the position that all that remained for the Board to do was to issue an order giving effect to the settlement. The Company took the positions that there was no settlement and in the alternative that, based on the provisions of the Act, the Board should not, and in fact could not, issue the enforcement order being sought by the Union.

The Agreed To Facts

4. Most of the facts relevant to these matters were not in dispute.

5. The Company commenced operations in or about February 2002. Thereafter, the Union filed an application under subsection 1(4) and section 69 of the Act alleging that the Company was bound to the Provincial ICI Collective Agreement for Millwrights (the Collective Agreement) as a result of its relationship with Resource Industrial Group (Board File No. 3659-02-R). In a decision of November 2nd, 2006, the Board (differently constituted) determined

that there had been a sale of business between the two companies and, as a result, Industrial was bound to the Collective Agreement.

6. On December 6th, 2006, the Union filed a grievance alleging that the Company had violated various articles of the Collective Agreement by employing persons that were not members of the Union in good standing and that had not been hired through Local 1916's hiring hall for work covered by the Collective Agreement and which fell within Local 1916's geographic jurisdiction. After the filing of this grievance the parties exchanged correspondence. This correspondence included the Company's grievance against the Union which is dated December 15th, 2007.

7. The core issue in dispute between these parties, which was the subject of both December grievances, involves the status of the existing employees of the Company as of November 2nd, 2006, when the Board issued its decision concerning the sale of business. The Union's position is that these individuals were not, and had never been, members of the Union and therefore had never been entitled to work for the Company under the terms of the Collective Agreement, yet alone being entitled to continue working for the Company after the Board's decision. Further, it is the position of the Union that even if the existing employees became members of the Union subsequent to the Board's decision, the Company was still in violation of the Collective Agreement as it was not entitled to continue to employ these specific employees as all hiring would have to be done in accordance with the hiring hall provisions of the Collective Agreement.

8. The Company's position with respect to its existing employees is that it, and the existing employees themselves, had taken steps to try to have the employees become members of the Union following the Board's decision and that the Union had refused to take these employees into membership. The Company takes the position that, in view of the specific circumstances of these matters, the refusal of the Union to take the existing employees into membership and its refusal to allow them to continue to work for the Company is not only a defence to the Union's grievance but also constitutes a violation of both the Collective Agreement and the Act.

9. Eventually both December grievances were referred to the Labour Management Relations Committee (LMRC), which forms Step Three of the grievance procedure established by Article 11 of the Collective Agreement. These grievances were dealt with by the LMRC on January 11th, 2007. Representatives of both parties were in attendance at, and participated in the processes of, the LMRC when it dealt with these grievances. Written minutes of the LMRC's meeting were issued to both parties. The section of the minutes entitled "Decision of Committee" states the following:

> The Committee found Industrial Redi-Works bound to the Millwright Provincial ICI collective agreement by virtue of the decision by the OLRB on November 2, 2006. And as such the committee stated that the Company was required to follow the terms of collective agreement when performing work covered by the Collective Agreement and specifically Article 2(a) "the employer agrees to hire and/or employ as Millwrights only members in the good standing of the United Brotherhood of Carpenters and Joiners of America…." And 2(b) HIRING "when hiring, all Millwrights shall be hired by the Employer through the affiliated Local Union having jurisdiction over the project….."

> In regard to the union violating the collective agreement, is [sic] was determined that there was no article in the agreement that required the Union to accept any worker into the union and therefore no violation had occurred.

10. Thereafter, on January 12th, 2007, the Union filed its second grievance alleging that the Company was not only continuing to violate the Collective Agreement as set out in its December 6th, 2006, grievance but that the Company was also required to immediately comply with the decision of the LMRC concerning both the Union's and the Company's December grievances and that the failure to do so would constitute a further violation of the Collective Agreement.

11. The Union referred both of its grievances to arbitration before the Board on January 16th, 2007. The Company referred its grievance to arbitration on January 22, 2007. As noted above all three matters were scheduled to be heard together.

Facts Not Agreed To

12. The principal facts which were not agreed to related to the reasons for the Union's refusal to take the existing employees into membership and its refusal to allow them to continue to perform bargaining unit work for the Company.

13. The Company alleged that the sole reason why the Union has refused to allow the existing employees to join, and thereafter to continue working, is because the Union suspects that the employees, either with or without the assistance of the Company, will file an application seeking to terminate the Union's bargaining rights in the upcoming open period. The Company claims that the Union informed both it and its employees of this reason in various verbal and written communications.

14. The Union does not deny that it had refused to take the existing employees into membership and that this refusal was, at least in part, based on a fear that these employees would bring a termination application, although it does not agree it was required to take these individuals into membership. Further, the Union asserts that it was the Company that had informed it that this termination of bargaining rights is what the Company was going to ensure happened after the existing employees had been successfully signed into membership and allowed to continue working. Further, the Union states that it had additional reasons for not taking these individuals into membership and not allowing them to continue working for the Company. Specifically, it relied on the large number of unemployed Union members registered with Local 1916's hiring hall that should have been working for the Company and, more generally, it was alleged that the Company's existing workforce could not, in all likelihood, be kept in place in any event as to do so would be in violation of the journeyman to apprentice ratios set out in the collective agreement.

Argument and Decision

15. The union argues that, under the language of the Collective Agreement the actions of the LMRC on January 11th, 2007 constitute a decision and as such constitutes a settlement of the grievances that it is entitled to enforce by way of a decision of the Board.

16. Conversely, the Company argued the LMRC had not reached a decision and in any event even if there was a decision which constituted a settlement, it could not and should not be enforced.

17. Despite the Company's arguments to the contrary, the Board is satisfied that the LMRC did reach a decision on January 11th, 2007, and therefore the real question to be determined is the effect and enforceability of that decision in these circumstances.

18. To establish its position that the decision constituted an enforceable settlement the Union relied on the language of Articles 11 (f), (g) and, in particular, (h) of the Collective Agreement and three cases decided by the Board dealing with the effect of LMRC decisions: *E. S. Fox Limited*, [1992] OLRB Rep. Jan. 29 (upheld on judicial review by the Divisional Court [1994] OLRB Rep. Nov. 1609); *Trentfab Industrial Contractors Inc.* unreported decision dated August 6, 2003 (Board File No. 1369-03-G) and *IC Mechanical* unreported decision dated November 5, 2004 (Board File No. 2557-04-G).

19. Articles 11 (f), (g) and (h) state the following

> (f) If a grievance is not settled during Step Two within the time allowed, the grievance shall be referred, by the grieving party's representative, to the Labour Management Relations Committee within five working days. All parties shall be notified in writing by the Labour Management Relations Committee as to date(s) for the hearing of the grievance. (N.B. The Association and the Council will establish a standing bi-monthly schedule for hearing such grievances.)
>
> Where there is a potential ongoing liability, the Labour Management relations Committee will meet as soon as practically possible to deal with the matter. All parties shall be entitled and encouraged to have representatives at the meeting to present their side of the matter.
>
> (g) The Labour Management Relations Committee shall consist of three (3) members from the Association and three (3) members from the Council. No member directly involved in the grievance shall sit on the Labour Management Relations Committee.
>
> (h) A decision of the Labour Management Relations Committee may be enforced by the Council of the Association by filing the grievance and the decision with the Ontario Labour Relations Board pursuant to Section 133 of the Ontario Labour Relations Act (and any successor section).
>
> If the Labour Management Relations Committee fails to resolve the matter to the satisfaction of both parties to the grievance within a period of twelve (12) working days from the time the written grievance was received by the committee or such further period as may be agreed upon between the parties to the grievance, the matter may be referred to arbitration in accordance with Article Twelve.

20. The decisions of the Board in *Trentfab Industrial, supra,* and *IC Mechanical, supra,* were both default decisions and are therefore of little assistance in this matter. In both cases the

Board issued orders enforcing decisions of the LMRC. However, given the complete lack of participation by either employer in the Board proceedings, there was no argument raised, and no facts pleaded to establish, that the LMRC had not, by its decision, "resolved the matter to the satisfaction of both parties to the grievance". Therefore, in both of these cases there was absolutely no basis for the Board not to issue orders enforcing the LMRC decisions as sought by the Union.

21. The decision of the Board in *E. S. Fox, supra,* is somewhat different. In that case the employer, E. S. Fox, was clearly not satisfied with the decision reached by the LMRC and sought to have the merits of the grievance arbitrated by the Board. The Board found that, under the language of the collective agreement that it was considering, the decision of the LMRC constituted the settlement of the grievance despite the employer's objection to it and proceeded to issue an order enforcing that settlement.

22. The relevant paragraphs of the grievance procedure dealing with the LMRC, established by Article 11 of the Millwrights' Provincial Agreement, as it existed in 1992, and which were interpreted by the Board in *E. S. Fox, supra,* read as follows:

> . . .
>
> If the Labour-Management Relations Committee fails to resolve the matter to the satisfaction of both parties within a period of two weeks from the time the written complaint was received by the Committee or such further period as may be agreed upon between the parties, this step shall be deemed to have been complied with.
>
> A decision of the Labour-Management Committee in favour of the Union or the Association may be enforced by the Union or the Association by filing of the Grievances and the Decision with the Ontario Labour Relations Board pursuant to section 124 [now section 126] of the Ontario Labour Relations Act (any successor section).
>
> . . .

23. Based on this language the Board reached the following conclusion set out at paragraphs 14 and 15 of its decision:

> 14. This collective agreement, as set out in the title or cover page to the Agreement, is between the Association of Millwrighting Contractors of Ontario, Inc. and the Millwright District Council of Ontario. Sections 144 [formerly 142 and 148(1)(2) [formerly section 146(1)(2)] of the Act state:
>
> > 144. Where an employee bargaining agency has been designated under section 141 or certified under section 142 [formerly section 140] to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the

> employee bargaining agency, concluding a provincial agreement.
>
> 148.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents. (2) On and after the 30th day of April, 1978 and subject to sections 141 and 147, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

> Therefore, by statutory requirement the only signatories to the provincial agreement are the Association and the Council. In accordance with the statutory framework governing the construction industry in Ontario, E.S. Fox cannot be a signatory to the provincial agreement. The Act provides that the Association and the Council are the entities empowered to negotiate collective agreements on behalf of local employers and local unions.
>
> 15 We were unable to find any clause (nor was any clause pointed out to us by counsel) in the collective agreement placed before us, defining the term "parties". There is nothing in the agreement which states that when the term "parties" is used in the grievance procedure that it shall mean anything other than the parties to the provincial collective agreement, the Association and the Council. Nevertheless, when Article Eleven is read in its entirety we are satisfied that individual employers and local unions are "parties" in the sense that they can file grievances and negotiate at Step One of the grievance procedure in an attempt to settle the matter. If the matter is not resolved at Step One or Step Two it proceeds to Step Three. We are satisfied that Fox is a "party" at Step Three to the extent that it is entitled to be represented at the Committee's meeting(s). We do not accept counsel for the respondent's submissions that before a matter can be settled at Step Three and a decision of the Committee issue, the individual employer and local union must agree with the decision. The effect of the Committee's decision is to resolve the grievance. The final paragraph under Step Three makes it clear that the Committee has the authority to issue a decision. This is not qualified by any language requiring the consent or agreement of the individual employer or local union.

24. There are significant differences in both the wording and the structure of the relevant paragraphs of the Collective Agreement as it now exists, as opposed to how it existed in 1992, which call into question the relevance of the Board's decision in *E. S. Fox, supra*, to these matters.

25. What is now the first paragraph of Article 11 (h) was, in 1992, the final paragraph of Article 11 (a) of that collective agreement. That language structure, as it existed in 1992, allowed the Board to conclude that, not only did the LMRC have the right to make a decision but, this right was not qualified or restricted. As noted above the concluding sentences of paragraph 15 of the Board's decision in *E. S. Fox* states the following:

> The effect of the Committee's decision is to resolve the grievance. The final paragraph under Step Three makes it clear that the Committee has the authority to issue a decision. This is not qualified by any language requiring the consent or agreement of the individual employer or local union.

26. This may in fact no longer be the case. The first paragraph of Article 11 (h) of the current Collective Agreement clearly still provides the LMRC with the right to make a decision, and for the Association or the Council to seek the enforcement of that decision before the Board, but it is unclear if LMRC's right to make a decision remains as completely unqualified and unrestricted as it was previously. The second paragraph of Article 11 (h) now appears to directly qualify the implications and effects which may follow from the issuing of a decision by the LMRC, as it states the following:

> If the Labour Management Relations Committee fails to resolve the matter to the satisfaction of both parties to the grievance within a period of twelve (12) working days from the time the written grievance was received by the committee or such further period as may be agreed upon between the parties to the grievance, the matter may be referred to arbitration in accordance with Article Twelve.

27. Article 11 as it was in 1992 did contain a similar paragraph to the second paragraph of Article 11 (h) of the current Collective Agreement. However, the 1992 paragraph concerning the satisfaction of the parties appeared prior to the paragraph providing the LMRC with the power to make a decision and was therefore interpreted as not qualifying or restricting the effect of any such decision. Now this paragraph forms the final portion of Article 11(h) and would clearly seem to provide for access to arbitration if the grievance has not been resolved by the LMRC *"to the satisfaction of both parties to the grievance"*.

28. In addition, the concept of *"party"* was also quite different in the 1992 Collective Agreement. As is clear from paragraph 15 of the *E. S. Fox, supra* decision in 1992 the term *"party"* was unmodified and this led the Board to conclude that it meant one of the parties to the collective agreement. An individual employer, like E. S. Fox might be a party to a grievance but was only bound by, rather than being a party to, the collective agreement. Therefore, under the 1992 language it made no difference whether E. S. Fox was satisfied with the resolution arrived at by the LMRC, or not, as only a party to the Collective Agreement, meaning one of the two ministerially designated EBA's, that was not satisfied with the LMRC's resolution could thereafter refer the grievance to arbitration.

29. The current language is different. It refers to the resolution reached by the LMRC being mutually satisfactory to *"parties to the grievance"*. Even based on the previous language the Board was prepared to find that E.S. Fox was a party to the grievance. Now based on the current language of Article 11(d), which is step one of the grievance procedure established by this Collective Agreement, it seems clear that an employer may be a party to a grievance. For

example, in this case the Union did not file its grievances against the Association but rather it filed them against a particular employer, namely Industrial. Similarly, the December 15^{th}, 2006, grievance was not filed by the Association on behalf of an employer but was filed by Industrial itself. In such circumstances it is hard to see how an individual employer like Industrial would not be a party to these grievances. Therefore, it would seem that by using the phrase *"to the grievance"* to describe the word *"parties"* in the second paragraph of Article 11 (g), the parties to this Collective Agreement may have significantly enhanced the ability of individual employers and Local Unions to proceed to arbitration following a decision of the LMRC from situation as it existed under the 1992 language.

30. However, in the specific circumstances of these grievances it is not necessary to determine the on going relevance of the Board's decision in *E. S. Fox, supra.* The Board made clear in *E. S. Fox, supra,* that there are circumstances which would lead the Board to refrain from enforcing the decision of the LMRC. Specifically, at paragraph 16 the Board stated the following:

> 16. In this case there was no allegation raised by either of the local parties that the Association or the Council, or their spokespersons on the Committee, had acted in a manner that was arbitrary, discriminatory or in bad faith. Nor was there any suggestion of collusion on the part of the Association or the Council or the members of the Committee (see section 151 of the Act). In the absence of such factors, we should not lightly interfere with the mechanism for the resolution of disputes which the parties have negotiated into their collective agreement.

31. Here, in these specific circumstances, Industrial asserts that the Union's interpretation, administration and application of the relevant articles of the Collective Agreement (specifically including Article 2 which deals with union security and hiring), which were upheld by the LMRC, is in violation of various sections of the Act. Accordingly, Industrial argues that the "settlement" which the Union relies upon is itself in violation of the Act.

32. The Board, whether sitting as a Board of Arbitration or otherwise, cannot and will not give effect to or enforce a settlement which is in violation of the Act. Therefore, if this is in fact the case with respect to the January 11^{th}, 2007, decision of the LMRC, the Union's request for the Board to enforce that decision must fail.

33. None of this is to say that the manner in which the Union, and thereafter the LMRC, have sought to interpret, administer and/or apply the Collective Agreement, is in anyway in violation of the Act. The material facts asserted by Industrial are far from the norm and its arguments are quite novel and therefore, it may be difficult for Industrial to succeed. However, as the Board has stated on many occasions the mere fact that a particular argument is unusual or may be hard to prove does not mean that it has no chance of success and should not be entertained. The "nature of the violations" alleged to be relevant by Industrial to its arguments are serious and based on the pleadings themselves, and the various correspondence between the parties appended to and relied on in the pleadings, it appears that Industrial has set out at least an arguable case on a *prima facie* basis. Whether, based on the evidence and the legal arguments, Industrial can be successful remains to be seen but it nevertheless has the right to try to persuade the Board particularly as to enforce the LMRC's decision, as the Union has requested, might, if

Industrial is correct, have the result of the Board enforcing a settlement which is in violation of the Act.

34. Based on all of the above the Union's preliminary motion is denied and these three matters will be scheduled for further days of hearing. However, as is clear from all of the above, this case is far from the "run of the mill" construction industry grievance. Therefore, given all of the circumstances, including the appearance that, but for the Employer's novel arguments concerning violations of the Act, all of the facts necessary to prove the violations of the Collective Agreement alleged by the Union seem to have been either agreed to or can be established with a minimum of evidence, and that the bulk of the evidence which must be heard relates to the Company' defence/grievance, it makes sense for Industrial to proceed in calling its case first and the Board so orders.

35. This panel is seized.

0678-06-U; 1977-06-U Jeremy Woodcock, Applicant v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) on behalf of its Local 6571, Responding Party v. Gerdau Ameristeel Inc., Intervenor; **Ronald Goodchild**, Applicant v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) Local 6571, Responding Party v. Gerdau Ameristeel Inc., Intervenor.

Duty of Fair Representation – Health and Safety – Practice and Procedure – The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application – The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory – The Board found that the union had acted properly: it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance – Application dismissed – Second matter to be scheduled for hearing

BEFORE: *Peter F. Chauvin*, Vice-Chair.

APPEARANCES: *Jeremy Woodcock, Tara Leddy, Ronald Goodchild* and *Pattie Goodchild* for the applicant; *Mark Rowlinson, Mohamed Baksh* and *Denis Kavanagh* for the responding party; *Mark Contini, Susan Armstrong, Anthony Mancini* and *Courtney Livesey* for the Intervenor.

DECISION OF THE BOARD; March 5, 2007

1. Board File No. 0678-06-U is an application under section 74 of the *Labour Relations Act, 1995* (the "Act") filed on June 1, 2006, in which Mr. Woodcock alleges that the responding

party ("Local 6571") acted in a manner that was arbitrary, discriminatory or in bad faith by not representing him properly in connection with his concerns regarding health and safety at Gerdau Ameristeel Inc. In support of his allegations, Mr. Woodcock has submitted, in addition to his application, numerous letters and documents.

2. Board File No. 1977-06-U is an application filed on September 28, 2006 under section 74 in which Mr. Goodchild similarly alleges that Local 6571 has violated section 74 in connection with its representation of him, regarding his workplace health and safety concerns. Mr. Woodcock represents Mr. Goodchild in connection with this application.

3. There is a similarity of allegations and a common factual foundation between the Woodcock and the Goodchild applications. Accordingly, by decision dated December 28, 2006, I ruled that the two applications would be heard together.

4. A consultation was conducted on February 20, 2007. Mr. Goodchild attended and was represented by Mr. Woodcock. I ruled that I would hear and render a decision regarding Mr. Woodcock's initial application first, and thereafter I would hear and render a decision on Mr. Goodchild's subsequent application. However, I informed Mr. Goodchild that any rulings that I may make in my decision regarding Mr. Woodcock's application that pertain to the same facts or legal issues that arise in his application will be binding upon him. Accordingly, I informed Mr. Goodchild and Mr. Woodcock, as Mr. Goodchild's representative, that they could address, on February 20, 2007, any facts and issues that are common to both the Woodcock application and the Goodchild application.

5. All of the allegations plead by Mr. Woodcock, Local 6571 and Gerdau Ameristeel were thoroughly canvassed at the consultation. The parties were given a full opportunity to state their position and question the positions of the other parties. As a result of this process, it became clear that most of the facts are not in dispute. Rather, the legal conclusions that should be drawn from those facts are in dispute. The Board required Mr. Woodcock, Mr. Waterman and Mr.VanVanderberg to give sworn testimony under oath regarding those relatively few facts that remained in dispute. Again, the parties were allowed to cross-examine each other regarding this sworn testimony.

6. Having regard to the above, and the undisputed documents filed in this matter, I find that the facts are as follows.

The Facts

7. Gerdau Ameristeel operates a steel mill in Whitby. It employs about 500 workers who are subject to a collective agreement with Local 6571. The collective agreement states, at Articles 3.01 and 19.01 that:

> **3.01** There will be no discrimination, intimidation, interference, restraint or coercion exercised or practiced by the Company or its representatives against any employee because of the employee's membership in, or connection with the Union.
>
> **19.01** The parties desire to maintain high standards of safety and health in the workplace and agree to co-operate in the continuing objective of

> developing a safe work environment by correcting unsafe conditions and unsafe acts in order to prevent industrial injury and illness.
>
> The Company shall act in a responsible manner to ensure that safe and healthy conditions prevail within the workplace. The Company agrees to take all reasonable precautions necessary to prevent or correct situations liable to endanger the health and safety of employees.
>
> The Company agrees to meet and, where possible exceed, the letter and intent of all applicable standards of the Occupational Health and Safety Act and Regulations in effect at the time of signing this Collective Agreement.

8. In the fall of 2005 Mr. Woodcock was performing modified work, due to a back injury, in the lower caster torchman's pulpit area ("the LCTP area") of the melt shop. In October 2005, Mr. Woodcock returned to performing his regular duties in the LCTP area.

9. In November and December 2005, Mr. Woodcock was in receipt of Sickness and Accident ("S & A") benefits, and was off work with a lung condition for approximately six weeks. Mr. Woodcock did not make a WSIB claim regarding this absence. In mid December 2005, Mr. Woodcock returned to his regular duties in the LCTP area.

10. On February 9, 2006 Mr. Woodcock was pouring heats in the LCTP area. He complained to his foreman, Mr. Morty Edwards, that he had lung discomfort. Mr. Edwards told him to see the Plant Nurse. Mr. Woodcock asked Mr. Don Waterman, the Local 6571 Chair of the Joint Health and Safety Committee (the "JHSC"), to accompany him. No other employees complained of any lung discomfort on that day.

11. Mr. Woodcock and Mr. Waterman met with Mr. Paul Holey, Mr. Woodcock's Supervisor, and Mr. Dave McIntyre, the Melt Shop General Foreman. It was decided to temporarily re-assign Mr. Woodcock to do inventory and identify rolls in the roll shop, which is well away from the melt shop.

12. Approximately one hour later, Mr. Woodcock returned and told Mr. Waterman that he wanted to go home. Mr. Woodcock alleges that Mr. Waterman said "Why? The problem is solved" and that Mr. Waterman refused to call an ambulance for him. Mr. Waterman denies saying that. Rather, Mr. Waterman says that he told Mr. Woodcock that he would have to get a medical report if he wanted further modified work and that if he wanted an ambulance he should ask Gerdau Ameristeel to call one for him. Mr. Woodcock left the workplace. Mr. Woodcock has not returned to work since February 9, 2006.

13. On February 10, 2006 Mr. Woodcock called in a complaint to the Occupation Health and Safety ("OHS") Branch of the Ministry of Labour ("the MOL") stating that the LCTP area is a confined space that lacks ventilation and is unsafe.

14. On February 13, 2006 OHS Inspector Joseph Ah-Hone met with Mr. Waterman, Mr. Brian VanVolkenburg, Local 6571 member of the JHSC, and Dan Szuch, Gerdau Ameristeel's Health and Safety Manager, and inspected the LCTP area. Mr. Ah-Hone

issued a report in which he states that the LCTP area is not a confined space and declined to make any Orders.

15. Mr. Woodcock alleged that Mr. Waterman and Mr. VanVolkenburg colluded with Mr. Szuch by intentionally not informing Mr. Ah-Hone that he had been off work in late 2005 with a lung condition and that two other workers had experienced lung problems at work in the past. This is one of the primary grounds upon which Mr. Woodcock founds his section 74 complaint. However, Mr. Ah-Hone's Report dispels this, in that it clearly states that Mr. Ah-Hone was aware that Mr. Woodcock and other employees had prior concerns regarding their lungs: The Report states that:

> The worker had stated that he was suffering from a lung condition that prohibits him to climb up to the Teeming pulpit area... There are two (2) employees currently on long-term disability for health issues relating to their lungs. The employees have been off work for a few years. There is no evidence that the health issues are related to this workplace. No claim has been submitted to the WSIB for any occupational disease to these workers.

16. Mr. Woodcock alleges that in mid February he asked Mr. Waterman and Mr. VanVolkenburg whether the air in the LCTP area was being tested, and that their response was "its being tested as we speak".

17. In mid February air sampling was conducted at Gerdau Ameristeel, as part of its regular monitoring program. However, the LCTP area was not inspected at that time. Mr. Waterman and Mr. VanVolkenberg denied that they meant to mislead Mr. Woodcock in any way regarding air testing in the LCTP area.

18. Mr. Woodcock applied for S & A benefits and requested a loan, pursuant to letter No. 12 of the collective agreement, pending receipt of the S & A benefits. The loan was not forthcoming. On March 20, 2006 Local 6571 filed a grievance on his behalf. By letter dated May 25, 2006 Gerdau Ameristeel accepted the grievance and granted the loan.

19. On April 20, 2006 Balwant Kheti, OHS Hygenist, conducted air sampling in the LCTP area and issued a Report dated May 10, 2006 in which he found that the Beltec ventilation unit that supplies fresh air to the LCTP area was fully operational. Mr. Kheti also directed Gerdau Ameristeel to conduct an exposure assessment in the LCTP area.

20. In accordance with the May 10, 2006 Order, Gerdau Ameristeel retained H & S Solutions to conduct the required exposure assessment in the LCTP area and submitted a Compliance Plan to Mr. Khati stating that it would have the results from the exposure assessment by June 19, 2006 and would provide same to Mr. Khati.

21. Mr. Woodcock filed this application on June 1, 2006. Events subsequent to June 1, 2006 have been added by subsequent pleadings, which have been accepted by the Board.

22. Mr. Woodcock attempted to file an appeal of the May 10, 2006 Order under section 61(1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O-1 as amended (the "OHSA"). However, Mr. Woodcock did file his appeal in a timely manner, and the application was not accepted.

23. On June 9, 2006 Mr. Khati issued a follow up report confirming that Gerdau Ameristeel had submitted a Compliance Plan stating that the May 10, 2006 Order would be fully complied with by June 19, 2006.

24. On June 12, 2006 H & S Solutions gave its exposure assessment report to Gerdau Ameristeel. This report states that the airborn levels to the agents assessed were all satisfactory and that the LCTP area was being supplied with adequate fresh air and was comparable to being outdoors. This report was given to Mr. Khati.

25. On August 2, 2006 Mr. Khati conducted a follow up visit. In his report Mr. Khati reviewed the H & S Solutions report and concluded that the air quality in the LCTP area was satisfactory and that "the air monitoring results presented in the report indicate the ventilation systems in place to be adequate to control air contaminant levels well below their occupational exposure values". Mr. Khati found that the filters in the ventilation system were adequate, and directed Gerdau Ameristeel to implement and document a preventative maintenance program to record the maintenance of the air filters serving the LCTP area.

26. At the hearing in this matter, Mr. Woodcock alleged that there were no filters in the ventilation system prior to August 2, 2006. However, he had no evidence to support that allegation. Gerdau Ameristeel denied this allegation.

27. Mr. Woodcock filed a claim with the Workplace Safety and Insurance Board (the "WSIB"). This claim had not been allowed as of the hearing date, February 20, 2007. Mr. Woodcock stated that he did not request Local 6571 to assist or represent him in connection with this WSIB claim.

28. Mr. Woodcock also filed an S & A claim. Mr. Woodcock was granted one year of S & A benefits, which ended in February 2007.

29. Mr. Woodcock has requested long term disability ("LTD") benefits. The LTD insurance carrier has requested that Mr. Woodcock undergo an independent medical examination ("an IME"). However, Mr. Woodcock has refused to undergo an IME. As such, LTD benefits have not been granted.

30. Mr. Woodcock confirmed that he did not request Local 6571 to file a grievance regarding any violation of Articles 3.01 or 19.01 of the collective agreement between February 9, 2006 to the hearing date, February 20, 2007.

31. Representatives of Local 6571 participated in the field visits conducted by Mr. Ah-Hone and Mr. Khati.

Mr. Woodcock's Submissions

32. Mr. Woodcock's application is based upon his allegations that Local 6571: told him on February 9, 2006 that the problem is solved and did not call him an ambulance; concealed from Mr. Ah-Hone that he had experienced a lung condition in late 2005 and that two other employees were off work with lung conditions; told him in mid February that air testing in the LCTP area was being performed, and; did not challenge Gerdau Ameristeel's position that there were filters

in the ventilation system and that they were maintained regularly. Mr. Woodcock submits that Local 6571 is colluding with and protecting Gerdau Ameristeel and in doing so has misrepresented him in violation of section 74 and has not taken appropriate steps to protect his health and safety.

Local 6571's Submissions

33. Local 6571 denies the allegations upon which Mr. Woodcock bases his application and submits that it has taken all the appropriate steps to ensure that Mr. Woodcock's health and safety concerns have been properly investigated. In doing so, Local 6571 submits that it has properly represented Mr. Woodcock and has not violated section 74. Local 6571 notes that it participated in three field visits conducted by Mr. Ah-Hone and Mr. Khati which concluded that the workplace was safe and that Mr. Woodcock did not request Local 6571 to file any grievances regarding his health and safety concerns or to assist him in connection with his WSIB claim. Local 6571 notes that it did file a grievance regarding Mr. Woodcock's S & A loan, and that it was successful in obtaining that loan for Mr. Woodcock in May, 2006, when all of the other relevant events were unfolding.

Gerdau Ameristeel's Submissions

34. Gerdau Ameristeel denied that Local 6571 has failed to protect the health and safety of Mr. Woodcock or has failed to properly represent Mr. Woodcock. To the contrary, Gerdau Ameristeel submits that Local 6571 properly participated in the field visits and that the field visits concluded that the workplace was safe and that the health and safety of Mr. Woodcock and the other employees was being protected. Accordingly, Gerdau Ameristeel submits that Local 6571 has not in any way violated section 74.

Analysis

35. I find that Local 6571 has not violated section 74, for the following reasons.

36. Local 6571 acted appropriately on February 9, 2006. It met with Mr. Woodcock and participated in his reassignment to a different work area. It was appropriate to inform him that he would require a medical report if he wanted further modified work. Local 6571 did not violate section 74 when it said "Why? The problem's solved" or when it informed Mr. Woodcock that he would have to ask Gerdau Ameristeel if he wanted an ambulance.

37. The Ministry of Labour conducted three investigations on February 13, April 20 and August 2, 2006 and issued three reports, none of which concluded that the air in the LCTP area presented a health and safety danger to Mr. Woodcock or any of the other employees. Local 6571 participated in these investigations. There is no evidence that Local 6571 mislead the OHS Inspectors or in any way improperly colluded with Gerdau Ameristeel. To the contrary, the February 13, 2006 report proves that the OHS Inspector was aware that Mr. Woodcock and two other employees had health issues relating to their lungs. I do not find the statement in mid February that air sampling was being conducted to have been, under the circumstances, intentionally misleading or otherwise improper. There is no evidence that the filters were not installed in the ventilation system before August 2, 2006 or that Local 6571 was aware of this and concealed this information from the OHS Inspector.

38. Local 6571 did file a grievance for Ms. Woodcock regarding his S & A loan, and was successful in this grievance. Mr. Woodcock did not ask Local 6571 to file any grievance for him regarding any violations of Articles 3.01 or 19.01 of the collective agreement. Mr. Woodcock did not ask Local 6571 to assist him with regard to his WSIB claim. Mr. Woodcock was granted one year of S & A benefits.

39. Accordingly, I do not find that Local 6571 acted in a manner that was arbitrary, discriminatory or in bad faith in its representation of Mr. Woodcock. Board File No. 0678-06-U is dismissed.

40. The Registrar is requested to schedule Board File No. 1977-06-U for a consultation.

2386-06-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 1425105 Ontario Inc. o/a **Les Burch & Son Contracting**, Responding Party.

Certification – Construction Industry – Employee – Membership Evidence – Practice and Procedure – Reconsideration – In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD; March 2, 2007

1. The Board scheduled a hearing in this request for reconsideration of the Board's decision certifying the applicant. The request for reconsideration was based on allegations supported by affidavit evidence that the applicant had filed membership evidence on behalf of persons who had not signed that membership evidence.

2. The applicant retained a forensic document examiner to examine the original membership evidence and the affidavits filed in order to prepare an expert report. (The Board, by decision dated December 11, 2006, granted the applicant's document examiner access to the membership evidence and affidavit evidence filed with the Board.)

3. One of the individuals for whom membership evidence had been filed swore in his affidavit that he "did not prior to October 30, 2006 or on or after October 30, 2006 sign a union membership card signifying that I agreed to be a member of the Labourers' Union."

4. The applicant filed the expert's report with the Board, and in accordance with the Board's decision in this matter dated January 25, 2007, provided a copy of that report to the responding party despite the report revealing the name of the one person who had apparently signed the membership evidence and an affidavit swearing he had not signed any membership evidence. The expert's report concluded that it was "highly probable" that the same person who signed the affidavit had signed the membership evidence.

5. Counsel for the responding party advised the Board and the applicant that the employee who had signed the affidavit had "admitted that the signature on the membership card was his." Subsequently, counsel for the responding party advised the Board that the responding party now wishes to withdraw its request for reconsideration.

6. Therefore, having regard to the request of the responding party, its request for reconsideration of the Board's decision certifying the applicant is withdrawn.

1880-06-R Public Service Alliance of Canada, Applicant v. **OLG Slots at Georgian Downs**, Responding Party v. Georgian Downs, Intervenor.

Bargaining Unit – Certification – Conflict of Interest – Employee – The union applied for and was successful in a representation vote for a bargaining unit of security guards in the gaming area of Georgian Downs, a horse racetrack – The employer and the racetrack argued that the bargaining unit could not be appropriate because the guards monitored other employees, some of whom were in a different bargaining unit held by the same union – The Board examined the duties of the guards, their surveillance and security functions, their interaction with other employees, as well as the union's activities, bargaining rights and constitution, and found there would be no conflict or compromise in the guards' employment duties and their union responsibilities – Certification granted, subject to gaming registration

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Shannon Blatt, Christopher Wilson* and *Doug Kosakowski* appearing for the applicant; *Wallace Kenny, Gregory Power, Tina MacMillan, Janet Hunter* and *Bob Proulx* appearing for the responding party; *George Waggott* and *Chris Roberts* appearing for the intervenor.

DECISION OF THE BOARD: March 13, 2007

1. The name of the responding party in the title of proceedings is amended to read: "OLG Slots at Georgian Downs".

2. This is an application for certification under the *Labour Relations Act, 1995* as amended ("the Act") in respect of security officers.

3. The applicant won the representation vote by a 24 to 11 margin. However, the responding party (or "OLG Slots") and the intervenor (or "Georgian Downs") assert that, regardless of the vote outcome, the application ought to be dismissed. They contend that if the applicant (or "PSAC"), a trade union which admits to membership persons other than guards, becomes the bargaining agent, the security officers will be placed in a conflict of interest. OLG Slots says the conflict arises because of their duty to monitor the non-union OLG Slots employees, as well as some of the employees of Georgian Downs who are also represented by PSAC. The intervenor agrees that a conflict arises in respect of the security officers' interaction with Georgian Downs employees. The union takes the position that no conflict arises.

4. Only if I find there is no conflict of interest can PSAC be certified as the bargaining agent for the security officers: subsection 14(6) of the Act). Subsection 14(4) of the Act stipulates that it is the union's burden to satisfy the Board that no conflict of interest will arise.

5. At the outset of the hearing, counsel for OLG Slots advised the Board that it had an agreement with counsel for the union that documents produced by OLG Slots would be used exclusively for the purposes of the hearing, and returned by the union to OLGC Slots after the hearing. Counsel for Georgian Downs stated that his client had similar concerns regarding the confidentiality of the documents produced by his client.

6. It was also pointed out that if, following this decision, PSAC is in a position to be certified, the final certificate cannot issue until such time as the union is registered as a supplier under the *Gaming Control Act, 1992*.

The Evidence

(i) *The Operations and Regulatory Scheme*

7. OLG Slots is one of sixteen slots gaming businesses operated throughout the Province by the Ontario Lottery and Gaming Corporation. OLG Slots carries on its business in Innisfil, at the site of the horse racetrack operated by Georgian Downs. OLG Slots rents space from Georgian Downs, and is responsible for all activities that take place in that allotted space, which consists of a gaming floor on which 455 slot machines are played, a cashier's cage, a bar area, a bar car, a customer service desk (also known as the "Winner's Circle"), a security podium, and an area where the public does not have free access, commonly known in the industry as "the back of the house".

8. The OLG Slots facility is open to the public 18 hours per day on weekdays, and 24 hours on the weekend. There is always food and beverage service available when the gaming floor is open. Typically, from 200 to 600 patrons will be on the gaming floor on weekdays and considerably greater numbers on the weekends. On rare occasions, such as New Year's Eve, attendance will approach the maximum capacity of 1100.

9. Access to the various areas of operation are tightly controlled. Patrons have the run of the gaming floor and the dining and drinking outlets, but not beyond. The employees must enter and exit the premises through designated employee entrances. They use pre-authorized swipe badges to that end, and to access other authorized sections of the facility not open to the public. They must wear and display proper identification at all times.

10. There are a variety of employees of OLG Slots on the gaming floor at any one time, including slot attendants, slot supervisors, security officers, cleaners, and maintenance staff (some of the maintenance staff are Georgian Downs employees in the Georgian Downs bargaining unit). There are also a small number of food and beverage bargaining unit employees of Georgian Downs, including a bartender, on or around the gaming floor, pursuant to the contract between OLG Slots and Georgian Downs for the provision of food and beverage service to the patrons of OLG Slots. There are a total of about seven bartenders and ten food and beverage servers ("the servers") from among the Georgian Downs employee complement who work exclusively in the OLG Slots facility.

11. All told, there are 25 to 30 staff, including the Georgian Downs bartenders and servers, on the gaming floor during weekends, and 15 or more on weekdays. The witnesses gave varying estimates of the number of servers on the floor at any one time. I assume from the evidence that there is always a bartender present, and at least one server on the floor, which can go as high as three. Accordingly, at peak times, there can be as many as four Georgian Downs food and beverage employees on the gaming floor.

12. The servers traverse the gaming floor with their food/non-alcohol beverage carts (the carts and contents are the property of OLG Slots) and take orders from the gaming patrons. For alcohol orders, the servers must go to the bar, issue the order to the bartender, and run the drinks back to the patron. The servers handle money. To that end, each keeps a float, provided by Georgian Downs. The servers are permitted to accept tips.

13. Occasionally throughout a server's shift, the food and beverage supervisors of the bartenders and servers go on to the gaming floor. They too are in the Georgian Downs bargaining unit.

14. The food and beverage manager is a Georgian Downs employee, but not in the bargaining unit. That individual is rarely seen on the gaming floor.

15. It would be an understatement to say that the gaming business is highly regulated. The reason is that there runs through the operation a huge daily flow of cash, valuable tokens and tickets. In order to protect against any wrongdoing that might arise as a result, the employees must comply with a wide array of statutory and workplace regulations and requirements. For example, all employees of OLG Slots, and any of the employees of Georgian Downs who carry on activity in the responding party's premises, must have gaming licenses issued by the Alcohol and Gaming Commission of Ontario ("AGCO") following a rigorous application and interview process. Any person or entity wishing to do business with OLG Slots must also apply to and be registered with the AGCO as a supplier. The AGCO must refuse the application of an employee or a supplier on the basis of a reasonably held belief that the applicant will not act in accordance with law, or with integrity, honesty, or in the public interest having regard to the past conduct of the applicant or persons interested in the applicant.[1]

16. All employees of OLG Slots are required to report any misconduct, including the misconduct of co-workers. The Ontario Lottery and Gaming Corporation's gaming employee handbook, which applies to the employees of OLG Slots, cites as an example of misconduct that

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[1] *Gaming Control Act, 1992*, S.O. 1992, c.24, sections 10 and 11.

will result in corrective action up to and including termination, an employee's failure to report dishonest conduct or activities on the part of customers, guests or other OLGC employees. Included in the meaning of "gross misconduct" which may result in immediate termination, is failure to report harassment of an OLGC employee, a customer or guest.

17. OLGC employees, including those of OLG Slots, are subject to an internal Code of Business Conduct and Conflict of Interest. Under this Code, all employees are responsible for the protection of all corporate property used in carrying out their responsibilities, including the prevention of theft and damage. They are also to avoid conflicts of interest, described generally as "a situation in which an employee's private interest or personal consideration may affect or may appear to affect or be detrimental to the employee's independent judgment in acting in the best interests of the Corporation".

(ii) The Surveillance and Security Functions at OLG Slots

18. There is a surveillance department, separate and apart from the security department. Both surveillance and security functions are required by regulation made pursuant to the *Gaming Control Act, 1992*[2]. However, the staff of one are not interchangeable with the staff of the other. The surveillance department keeps an eye on activities on the gaming floor, through cameras which cover every aspect of the gaming floor, but which do not record audio exchanges.

19. There are some differences between the job descriptions of security officer and of surveillance operators. The main difference in their purpose, as stated in the "Position Summary" sections of the respective job descriptions, is that the security officers "are to protect the company's assets, patrons and employees against theft, fraud, vandalism and abuse", whereas the surveillance operator is "responsible for the constant observation of all company areas and report occurrences that may be detrimental to the security and welfare of the patron, employee or company asset".

20. The responsibilities and essential duties set out in the job description for security officer are:

> (i) Security officers are to protect the company's assets, patrons and employees against theft, fraud, vandalism and abuse in accordance to Internal Control Manuals.
>
> (ii) Perform gaming (verify card count, control access to sensitive areas, assist departments as directed or requested, etc.) and non-gaming (answering phones, log and control lost and found, monitor alarm panels, control and issue keys, maintain daily log, report writing, conduct investigations, etc.) related duties as assigned and required.
>
> (iii) Verify that employees are in compliance with AGCO policies and procedures.
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> (iv) Operate base radio, dispatch security officers for all escorts, chip/token fills, card or coin deliveries, answer phones and patron inquiries.
>
> (v) Provide first aid and medical attention as required.

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[2] *O. Reg. 385/99*, sections 19 and 20.

(vi) Promote and maintain the utmost integrity and the highest caliber of customer service and respect to all patrons, employees and OLGC personnel.

(vii) Maintain awareness of gaming operation at all times and comply with security policies and procedures in order to secure company assets.

(viii) Maintain a clean and safe work environment. Comply with safety procedures including use of required safety equipment and identify unsafe practices or conditions.

21. The security department at OLG Slots has approximately 40 security officers. They are subject to a substantial number of general policies and procedures, security operating procedures and emergency situation procedures. Among the many security operating procedures, the security officers are required to maintain vigilance and alertness at all times while on duty, and bring disagreements involving patrons and/or gaming floor personnel to the attention of their shift supervisor. There are a host of procedures applicable to the escorting of individuals, the maintenance and custody of keys, and the removal and transfer of money from the slot machines, ATM's and change vending machines, all of which involve security oversight by security officers over the course of their shifts.

22. Security officers are assigned to a post, and are expected to be familiar with all aspects of each type of post. Among the post assignments is the security podium where the officers are expected to maintain constant awareness of activities in the surrounding areas on the gaming floor and monitor and control entrance and egress, among other things. Another post assignment is the public entrance to the gaming floor, where the security officers are to monitor the incoming patrons for intoxication and to ensure no minors enter the facility. As well, the security officers ensure that persons on the OLG Slots' excluded list do not gain access. A third post is the gaming floor itself. Here the security officers patrol the floor and perform general monitoring of the game floor areas, engage in customer service interaction, and exercise crowd control functions, among other things. Keith Booth, a security officer who testified in this proceeding, said that the purpose of the gaming floor patrols is to be visible and available to the patrons and the staff.

23. There was no substantial oral testimony concerning whether or not there is a security post at the employee entrance to the OLG Slots facility, although there was evidence that there is a camera there, and a television monitor at the security podium. The generic Ontario Lottery and Gaming Corporation ("OLGC") manual applicable to all OLGC security operations, including the security department at OLG Slots, refers to such a post ("Employee Entrance to Gaming Floor"). Among the duties of the security officers assigned there is the responsibility to ensure that employees are in possession of and wearing identification tags. As I say, the witnesses did not allude specifically to such a post. Tina McMillan gave evidence about every security post except the employee entrance post. Mr. Booth, a security officer, did not refer to such a post. Nor was there evidence that any security officer is posted at the entrance through which the servers from Georgian Downs gain access to the gaming floor.

24. On weekdays there are usually around 6 security officers on hand. That increases to between 8 and 12 on the weekends. Typically two, sometimes three, officers are posted at the public entrances, one is posted at the security podium, and the remainder are on the gaming floor.

25. All OLG Slots employees and those employees of Georgian Downs who perform work in the OLG Slots facility must complete employee profile information sheets which are used to create swipe-card access codes, enabling the user to access only those areas for which he or she is authorized. The security department is responsible for recovering the cards of all terminated employees, or who otherwise no longer work in the OLG Slots facility. OLG Slots prohibits any individual with a swipe card from lending it to any other individual.

(iii) Interaction between security officers and employees

26. Although it is a rare occurrence, security officers are empowered to inspect any parcel, package, purse, handbag, briefcase or lunch box of employees. Mr. Booth explained that generally no such searches are undertaken unless an alarm is activated at the employee's point of egress. The alarms are frequently tripped by keys with alarm tags carried, presumably inadvertently, by the employees as they leave. A search of belongings will follow in those circumstances.

27. There is little direct interaction between the servers and OLG Slots security officers, according to Lisa King, a server on the gaming floor. If she happens to see an officer in the course of her duties, the most she might expect is an exchange of greetings. She has never noticed anything that would suggest the security officers are interested in her activities on the gaming floor. She has never been searched, and is not aware that any other server has been searched, by an officer. Nor has she or anyone she knows been disciplined following the filing of a report by an OLG Slots security officer.[3]

28. Ms. King acknowledged that she has an obligation to report the misconduct of co-workers to her supervisor. In response to counsel for the union, she also acknowledged being a member of PSAC. She said that her membership in PSAC has not affected her work or her view of her obligation to report misconduct. She stated that she would ignore any directive from PSAC not to report misconduct. She described an incident in which fellow servers reported each other as having engaged in harassment. Ms. King also readily conceded that she would expect an OLG Slots security officer to report any misconduct she might engage in on the gaming floor.

29. Security officers are required to document all "incidents" that occur on their shift. Incidents include events involving gaming floor employees, including the Georgian Downs servers, their supervisors, and the maintenance staff, although most of the suspicious activity observed by the officers typically involves only patrons. There are many rules and prohibitions applicable to workers on the gaming floor, including the Georgian Downs servers and maintenance personnel, and the security officers are expected to record any and all possible breaches that they observe or which are brought to their attention. Any documented incidents involving the Georgian Downs employees would be referred to Georgian Downs management. It is possible, though it has not yet occurred, that Georgian Downs might discipline its employees for inappropriate behaviour observed and documented by an OLG Slots security officer. It is also possible that the Georgian Downs bargaining agent, PSAC, might grieve the discipline, and that an OLG Slots security officer could be called to testify at an ensuing arbitration.

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[3] There was no oral testimony concerning the degree of interaction between the security officers and Georgian Downs bartenders or maintenance staff.

30. There have been some investigations by OLG Slots security officers of incidents involving Georgian Downs employees. One involved a complaint of a gaming floor patron concerning lost money. A server picked up and pocketed the patron's misplaced money off the floor. OLG Slots prohibits such conduct. A security officer looked into the matter with the server, who confirmed the patron's account, said she was unaware that she was forbidden from picking up and pocketing the money and in any event, had been in the process of taking the money to the podium when she was accosted by the patron's boyfriend. No action was taken against the server as a result of the investigation. The same server, however, was issued discipline by Georgian Downs for other incidents, including failure to return patrons' change. On one such occasion, the patron appears to have complained to OLG Slots security at the podium. The evidence before me does not disclose the details of the involvement in that matter of OLG Slots security officers. However, it is certainly not inconceivable that a security officer could be involved in this kind of investigation of a server, and that the results of the investigation could be relied upon by Georgian Downs to support the discipline of the server.

31. Employees of OLG Slots, including security officers, and the Georgian Downs servers may from time to time suspect that a patron is intoxicated. In such an instance, they are directed by the OLG Slots Alcohol Refusals Policy & Procedure Manual, to report the problem to the security podium on the gaming floor. (Presumably, if a gaming floor security officer noticed an intoxicated patron, he or she would be required to also file a written incident report.) Then, the podium security officer is to notify the server's food and beverage supervisor and the officer's security supervisor. The food and beverage supervisor, accompanied by the security supervisor, assesses the patron. If the patron is deemed by the food and beverage supervisor to be intoxicated, the food and beverage supervisor must cut off the patron from further service and indicate that the patron must leave. The security supervisor then notifies the surveillance department of the positive finding, and escorts the patron off the gaming floor and into the custody of Georgian Downs security for the purpose of being escorted off the premises.[1] Where the food and beverage supervisor determines that the patron is not intoxicated, that is the end of the matter, unless the security supervisor strongly disagrees, in which case the patron will be shown off the gaming floor.

32. Georgian Downs has disciplined at least one food and beverage server for over-serving alcohol to the patrons of the racetrack. Over-serving a patron to the point of intoxication could have serious consequences for both OLG Slots and Georgian Downs: it could lead to the loss of the liquor license held by Georgian Downs for the entire facility. It is possible that a server in the OLG Slots facility could be the subject of investigation by OLG Slots security if suspected of having over-served a patron with alcoholic beverages, and it is possible that discipline of that server could be imposed by Georgian Downs. However, given the OLG Slots procedure for alcohol assessments, any investigation of the server would probably involve the food and beverage supervisor and the security supervisor, and perhaps the surveillance department, rather than a security officer.

33. There was evidence of one controversial alcohol assessment on the gaming floor, in which a patron became upset upon being approached by a Georgian Downs food and beverage

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[1] The Georgian Downs security officers are not in a bargaining unit. They do not enter the premises of OLG Slots, but they occasionally have interaction with OLG Slots security with respect to escorting gaming floor patrons off the premises.

supervisor. As it turned out, the patron was found not to be intoxicated. The documented incident was conveyed by the OLG Slots security manager to the general manager, who followed up with management at Georgian Downs. As a result, improvements were made to the alcohol assessment process.

34. The Georgian Downs employees are subject to discipline for a number of offences stipulated in their collective agreement, regardless of whether or not they work in the OLG Slots area. If those offences were to be committed by servers and maintenance personnel on the OLG Slots gaming floor, and observed by or brought to the attention of OLG Slots security, they would likely be investigated and documented by an OLG Slots security officer. There was no evidence of that having happened. There was evidence that a Georgian Downs server assigned within the Georgian Downs facility was disciplined for failing to collect from a patron funds necessary to cover a bill. Another was disciplined for violating the Georgian Downs dress code. There is no reason to believe that the same disciplinary response would not issue if the servers had been assigned to the OLG Slots gaming floor and committed the same offences.

35. There was no evidence concerning the degree of fraternization between employees of OLG Slots and Georgian Downs. However, it was conceded by Tina McMillan, the general manager, that there are friendships between the employees of each business. She was not aware of any instance in which one friend refused out of loyalty to report the misconduct of another, although she did say there would be an obligation to do so, and that she expected employees would honour that obligation.

(iv) *PSAC's Activities, Bargaining Rights and Constitution*

36. The bargaining agent for the Georgian Downs employees is a directly chartered local of PSAC. The Georgian Downs bargaining unit employees are not required under the collective agreement to be or become members of PSAC.

37. The PSAC constitution is binding upon PSAC members, that is, anyone who signs a PSAC membership card. No member is required to take an oath of loyalty to PSAC or to other PSAC members, except those members elected to union office.

38. PSAC members are subject to discipline under the constitution for violating any provision of the constitution or a duly promulgated By-Law. Particular offences are listed in subsection 25(5) of the PSAC constitution. For example, a member would be subject to sanctions for crossing his bargaining unit's picket line pursuant to a lawful strike. The sanctions listed do not apply to a situation where the member crosses the picket line of another striking local. However, one PSAC policy, Policy 21, states that PSAC members are not to cross the picket line of another union unless permitted to do so by that union., and that PSAC members must honour any and all picket lines when called upon to do so by PSAC.

39. Notwithstanding Policy 21, in 2001, PSAC represented two bargaining units of workers located at Canada Revenue Agency in the same building in Sudbury. One bargaining unit was on a lawful strike, while the other unit of security guards was not. The guards inquired if they were required to participate in the strike of the other employees, and PSAC informed them that they were not.

40. Nor is it an offence under the constitution for a PSAC member to report the workplace misconduct of another PSAC member or another co-worker. According to Christopher Wilson, PSAC's Regional Director for Ontario, PSAC expects its members to carry out their job duties, including any duty to report misconduct. By way of example, Mr. Wilson spoke of a unit of PSAC security guards at Lester B. Pearson airport in which warrant officers in the unit were expected to supervise their fellow bargaining unit co-workers. Moreover, the guards in that unit were required to issue parking tickets, including to employees represented by PSAC in another unit at the airport. By way of further example, Mr. Wilson stated that PSAC advised inquiring employees of Georgian Downs that they should comply with their employer's request to sign a "whistle-blower" policy, and that the employees had a duty to report misconduct.

41. PSAC attempted to organize the non-security employees of OLG Slots in the spring of 2005. The campaign failed and was abandoned on or around May 19, 2005. There was no organizing going on at the time of this hearing, and Mr. Wilson testified that there were no plans to commence a new campaign. He conceded, however, that if the union thought a new campaign could be conducted in a viable manner, it would launch one.

42. Mr. Wilson conceded that membership in a trade union breeds solidarity between members in the larger labour movement.

Analysis and Conclusions

43. Section 14 of the Act reads:

> **14.** (1) This section applies with respect to guards who monitor other employees or who protect the property of an employer.
>
> (2) Unless the employer notifies the Board that it objects, a trade union that admits to membership persons who are not guards or that is chartered by or affiliated with an organization that does so may be certified as the bargaining agent for a bargaining unit composed solely of guards.
>
> (3) Unless the employer notifies the Board that it objects, a bargaining unit may include guards and persons who are not guards.
>
> (4) If the employer objects, the trade union must satisfy the Board that no conflict of interest would result from the trade union becoming the bargaining agent or from including persons other than guards in the bargaining unit.
>
> (5) The Board shall consider the following factors in determining whether a conflict of interest would result:
>
> 1. The extent of the guards' duties monitoring other employees of their employer or protecting their employer's property.
>
> 2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
>
> 3. Such other factors as the Board considers relevant.

> (6) If the Board is satisfied that no conflict of interest would result, the Board may certify the trade union to represent the bargaining unit.

44. As the Board has previously noted, "the conflict of interest contemplated by section 14 is a conflict between the guards' dedication to their employment duties and to their union responsibilities".[5] Moreover, this tension with which section 14 is concerned must manifest itself in a "real and serious conflict of loyalties".[6]

The extent of the security officers' duties monitoring other employees of their employer

45. Counsel for PSAC took the primary position that the security officers do not monitor other employees at all because they do not watch, or track the activities of, or follow employees in the course of their duties, and they do not admonish the employees for misconduct. In my view, the evidence does not support a finding that the security officers engage in no monitoring of the employees of OLG Slots or the Georgian Downs bartenders and servers. The security officers assigned to the podium and to the gaming floor, by necessity, engage in some form of employee monitoring. They are required to maintain a high level of awareness for the purpose of recording anything involving any person, including other employees, that might constitute a breach of statute, regulation, policy, procedure or rule applicable to the operations of OLG Slots. Their job description stipulates that they are to verify that employees are in compliance with AGCO policies and procedures. The security officers at the podium and on the gaming floor would not be able to perform fully their incident-recording and verification functions without engaging in some degree of monitoring the employees. And since all the security officers rotate through the various post assignments, at some point they all carry out a monitoring function.

46. The responding party and the intervenor submitted that, to the extent the security officers exercise *any* degree of monitorial duties in respect of OLG Slots or Georgian Downs employees, that is sufficient to give rise to a conflict of interest. I disagree. Such an interpretation is at odds with the plain language of subsections 14(1) and (5) of the Act. Subsection 14(1) states that section 14 applies to guards who monitor other employees or who protect the property of an employer. Subsection 14(5) requires the Board to determine the *extent* of the duties to monitor, as well as the *extent* of the duties to protect property of the guards' employer. The interplay of the two subsections suggests that, in assessing a conflict of interest, one of the factors is the scope, not merely the *existence*, of monitorial and property-protection duties. The Board must examine the qualitative and quantitative aspects of those duties against the entire spectrum of the security officers' responsibilities.

47. Nor do I accept the submission of OLG Slots that the monitorial authority of guards continues to enjoy pre-eminent status among all factors that the Board considers in such matters. The *Old Oak Properties* case made it clear that, with the passage of the *Labour Relations Act, 1995*, the statutory focus in conflict of interest cases had changed. From that point, the duty to monitor other employees became just one of a number of factors in the assessment of conflict of interest as it pertains to guards.[7]

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[5] *Casino Niagara*, [2001] OLRB Rep. July/August 968, at paragraph 34.

[6] *Old Oak Properties Inc.*, [1996] OLRB Rep. July/August 648, at paragraph 111.

[7] *Old Oak Properties Inc., supra*, paragraph 106. See paragraphs 88 through 111 for a complete analysis of the significance of the statutory changes introduced by section 14 of the Act.

48. In assessing the extent of the monitorial authority and duty to protect property of the OLG Slots' security officers, consideration must be given to the context in which that authority and duty are exercised.

49. First, the main focus of the security officers is on the patrons of OLG Slots. The officers assigned to the public entrances concentrate exclusively on the patrons to determine that they are of legal age, not intoxicated, and not otherwise ineligible to enter. The officers at the podium and on the gaming floor also have substantial interaction with the customers. They ensure that the patrons are conducting themselves in an appropriate manner consistent with the regulatory scheme applicable to OLG Slots, and they also look after the needs of the customers so that they enjoy their time in the facility. The customer service role of the security officers – and customer service is among the highest priorities of OLG Slots - is to deter or prevent customer misconduct, while at the same time to facilitate a pleasurable experience for the patrons. That is why the security officers, particularly those on the gaming floor, are expected to be "visible". This makes sense, because though the patrons are the life-blood of the business, unlike the employees, they are not licensed, and they have not been subject to AGCO scrutiny with respect to their integrity and honesty.

50. Secondly, the gaming floor is a highly populated area. There are usually at least a few hundred members of the public on it at any given time, and at peak periods there can be close to a thousand. Within that mix there may be between fifteen and thirty employees, including up to four Georgian Downs staff. The testimony of Ms. King and Mr. Booth was very consistent with respect to the amount of scrutiny the security officers pay to the activities of the employees. Beyond the exchange of greetings, there is very little such scrutiny or interaction.

51. Thirdly, the security officers at the podium and on the gaming floor cannot always be watching the interplay between patrons and employees. They have other responsibilities. For example, the podium officer must attend at times to the key log and to individual customers who wish to communicate with the officer. The gaming floor security officers are required to provide escorts and to oversee the transfer of money and tokens from hundreds of slot machines and cash from various automatic teller machines located throughout the facility. Every security officer has a duty to document incidents. Although these activities are not generally that time consuming, nevertheless, the attention of the security officers is not always focussed on the staff.

52. In short, there are competing forces which come to bear upon the attention and concentration of the security officers. The gaming floor customers consume much of their attention, the OLG Slots employees less so, relatively speaking. OLG Slots has justifiably high expectations of its security officers in terms of monitorial authority. Those expectations are not diminished by the existence of the surveillance department, or because the responding party also has expectations of its other employees to report misconduct. Nevertheless, the reality is that the security officers are not constantly monitoring the staff, whereas the surveillance operators are. The security officers are not in a position to do so, given the environment in which they operate. Their focus must be, and is, on the patrons. The duty to monitor the OLG Slots employees is by no means insignificant, nor is it considerable.

The extent of the security officers' duties protecting their employer's property

53. I come to the same conclusion with respect to this factor. The security officers perform important functions with respect to the transfer of money and other items of value belonging to OLG Slots. They protect their employer's property in the process. They also indirectly protect the physical premises and chattels in the sense that they watch for and prevent acts of vandalism or theft or wilful destruction. But again, they are far more cognizant of the patrons. The property-protection activities do not take up a particularly significant amount of the security officers' time and effort.

Any other duties or responsibilities of the security officers that might give rise to a conflict of interest

54. Might the duties of the security officers vis-à-vis the Georgian Downs employees who work on OLG Slots' premises give rise to a conflict of interest? There is no question that the duties and responsibilities of the OLG Slots security officers require them to report an incident involving these Georgian Downs employees who are in a PSAC bargaining unit and may be PSAC card-carrying members. It is entirely possible that the author of such a report might be compelled to testify in an arbitration proceeding, if discipline ensued. However, I see no likelihood of a conflict of interest in such a scenario. Nothing in the PSAC constitutional framework remotely requires PSAC members not to report the misconduct of other PSAC members. Nor are there any constitutional sanctions applicable to a PSAC member who reports another PSAC member. On the other hand, OLG Slots' rules and expectations require all OLG Slots employees, including of course the security officers, to report co-worker misconduct, or risk discipline up to termination. That applies equally to the misconduct of Georgian Downs employees working on the gaming floor. In my view, this clearly stated obligation, and the sanctions in the event of its breach, militate strongly against any likelihood that the security officers would fail in their duty to monitor and record any suspicious behaviour of the Georgian Downs employees, regardless of their union affiliation. Accordingly, I do not accept the arguments of the responding party and the intervenor with respect to the application of paragraph 2 of subsection 14(5).

Other factors as the Board considers relevant

55. Regardless of the degree of the officers' monitorial authority vis-à-vis OLG Slots employees, nothing in PSAC's constitutional framework, in my view, creates any real or serious tension between the security officers' loyalty to the union as union members and its loyalty to OLG Slots. The OLG Slots employees are not members of a PSAC bargaining unit. To paraphrase the reasoning advanced by the Board in the *Casino Niagara* case, it is difficult to imagine the possibility of a conflict of interest arising from the monitoring of OLG Slots employees when the security officers and the OLG Slots employees do not share a formal allegiance to the same union.[8] Moreover, there is no PSAC edict applicable to PSAC members that would give rise to any conflict of interest with respect to the protection of OLG Slots' property. This factor, therefore, favours PSAC in this application.

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[8] *Casino Niagara, supra*, paragraph 39.

56. As far as the relationship between the security officers and the Georgian Downs employees is concerned, the PSAC constitution does not require anything of its members that would compromise their loyalty to their employers. To the extent Policy 21 is a constitutional document, the evidence was that PSAC has discouraged any member from unlawfully picketing or striking in circumstances where another PSAC bargaining unit is engaged in lawful picketing or a lawful strike. In my view, nothing in the PSAC constitution would tend to compromise the security officers' loyalty to OLG Slots in favour of Georgian Downs employees. Moreover, it appears unlikely that the security officers could be in a position to know who of the Georgina Downs employees on the gaming floor are members of PSAC. Therefore, this factor assists PSAC's position in this matter.

57. Another factor is that the employees, not just the security officers and the surveillance department, are responsible for reporting the misconduct of their co-workers, even if those co-workers happen to be their friends, and to prevent theft of OLG Slots property. Failure to do so may result in discipline. It is not difficult to imagine that a security officer who failed to report employee misconduct, or who failed to report, or make any attempt to prevent, theft or damage to OLG Slots property, would face serious disciplinary consequences. In my view, this lessens the likelihood that a conflict of interest will arise. This too is a factor that benefits the union's position.

58. The responding party contends that I ought to take into account the high degree of regulation, including the provisions of the *Gaming Control Act, 1992* ("the GCA"), that applies to this workplace. Counsel pointed out the unique features of the governing statute, including the requirement to establish and maintain a security department and a security plan. Counsel referred me to provisions which prohibit gaming by union officials and employees of unions, illustrating the GCA's focus on avoiding even the appearance of conflict of interest in gaming facilities.

59. The degree of workplace regulation might be a relevant factor to be taken into account in assessing conflict of interest. However, I do not see how in this case the heightened level of workplace regulation applicable to OLG Slots makes it more likely that a conflict of interest arises from the certification of the bargaining agent. It may well bring into sharper relief the consequences for OLG Slots should a security officer decide to advance a trade union or related interest over the interests of the responding party. The consequences could, indeed, be severe, including the loss of the responding party's license to operate a gaming facility in Innisfil. But that does not mean, necessarily, that there is any greater risk that a conflict of interest will arise. Indeed, it might be argued that the risk is less, given the tight regulation of the workplace, including AGCO's scrutiny of the employees during the registration process. As I have indicated, the AGCO must refuse licenses to employee applicants who the AGCO believes lack integrity, honesty or will not act in accordance with the law, having regard to the past conduct of the applicant and any persons interested in the applicant. When the AGCO issues a gaming license to an employee, it is because, after delving into the history of that applicant, the AGCO is satisfied on a balance of probabilities that the individual has integrity, is honest and law-abiding, and does not have relationships with other persons that might compromise his or her employment duties.

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60. Counsel for the responding party urged me not to read subsection 14(5) in a way that would possibly preclude a section 14(2) objection in circumstances where a guard unit has been certified, and an application for certification for the other employees follows. This argument has

been previously dealt with and rejected by the Board at paragraph 42 of the *Casino Niagara* case. The Board stated that the Act simply did not address such a situation, creating a legislative gap. I see no reason to depart from the Board's reasoning in that matter.

61. For these reasons, I conclude that the applicant has discharged its burden of proof in this matter. It has demonstrated that no conflict of interest would result from its certification in this workplace.

62. Having regard to the results of the representation vote, the applicant is in a position to be certified for the following bargaining unit:

> all Security Officers of the OLG Slots at Georgian Downs in the town of Innisfil, Ontario, save and except supervisors, persons above the rank of supervisor, surveillance staff, office and clerical staff and students employed during the school vacation period

63. Upon receipt by the Board of proof that PSAC has been registered as a supplier pursuant to the GCA, the Board will issue a certificate.

64. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

65. The responding party is directed to post copies of this decision in a location or locations in the workplace where it is likely to come to the attention of the employees affected by the application. These copies are to remain posted for 15 days from the date of this decision.

3285-06-R Central Ontario Regional Council of Carpenters Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America, Applicant v. **Pace Enterprises (1998) Inc.**, Responding Party.

Certification – Practice and Procedure – A dispute arose with respect to the status of certain individuals in this certification application – The parties had refused to sign the Certification Worksheet following the Regional Certification meeting - The Board outlined the importance of recording parties' agreement at various points in the certification process, and its expectation that parties will affix their signatures to the worksheet in recognition of their confirmed positions – The absence of a signature on the worksheet will not preserve a unilateral right to later change or add to a position – Submissions directed

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

DECISION OF THE BOARD: March 26, 2007

1. This is a card-based application for certification in the construction industry, brought pursuant to section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The parties have filed submissions on the status of individuals whose presence in the bargaining unit on the application date is in dispute.

Was there an agreement around some of the challenges?

2. Counsel for the responding party takes issue with counsel for the applicant's assertion that the parties agreed that Bill Sly and Mike Johnson were to be included and similarly agreed that Bob Ottman and Mike O'Reilly were to be excluded. The responding party said that the parties had only informal discussions, but no agreement was reached.

3. The Certification Worksheet that was prepared by the Labour Relations Officer at the Regional Certification meeting does set out the appearance of such an agreement, but at the end of the day, none of the parties signed the document and the Officer noted "declined to sign".

4. For the past twenty-five years or so, the Board has used certification worksheets in some form or other to record the positions and agreements of the parties at various points in the certification process. Since 1995, with the introduction of vote-based certification in all cases, the Board has used certification worksheets to record positions and agreements of parties before the vote, immediately after the vote and at the Regional Certification meeting. These documents have consistently played an important part in the mediation, case management and adjudication of certification applications to necessarily crystallise positions and record agreements before next steps can be taken.

5. The Board's certification process depends to a great degree on parties' co-operation and willingness to commit to positions as the process unfolds. Commitment to positions takes on increased importance as the process advances. By the time the parties have met with an Officer at a Regional Certification meeting, the Board insists that parties cement their positions and reflect them in the Certification Worksheet. We expect the parties to sign off the Certification Worksheet to show that it accurately sets out all of the matters that are agreed, all the matters that remain in dispute, and their respective positions about the issues in dispute. Parties are directed to make submissions based on the identified matters in dispute, and the Board makes its case management decisions and scheduling plans on the basis of the parties' agreements about what has been resolved and what must be determined by the Board.

6. We expect that parties sign off the Certification Worksheet to confirm that it accurately sets out what has been agreed and what has to be determined by the Board. But even in the absence of signatures of the parties, the Board will rely on the Certification Worksheet as an accurate record of the parties' positions. We are satisfied that the Regional Certification meeting offers a fair opportunity for parties to turn their minds to what is in issue, and make decisions about how the application is to be advanced. The parties are given an opportunity to review and retain a copy of the Certification Worksheet. Therefore, we do not think it unreasonable to require parties to make binding decisions at that point. A party who later seeks to advance a position that is different from or supplemental to a position set out on the Certification Worksheet will have to convince the Board that there is good reason for the change or addition. The absence of a signature on the Certification Worksheet does not preserve a unilateral right to later change or add to a position.

7. The responding party is directed to deliver to the applicant and file with the Board any submissions it wants to make about why the Board should not rely on its apparent agreement that that Bill Sly and Mike Johnson were to be included and that Bob Ottman and Mike O'Reilly were to be excluded by no later than **April 3, 2007**. The applicant must deliver and file any response by no later than **April 10, 2007**.

8. The Registrar is directed to place the submissions before this panel of the Board if convenient.

3156-06-R; 3362-05-R; 3237-06-R; 3238-06-U; 3256-06-R; 3257-06-U; 3260-06-R ; 3261-06-R; 3263-06-U; 3450-06-R Canadian Construction Workers' Union, Applicant v. **PBS General Contractors Inc.**, Responding Party: Drywall Acoustic Lathing and Insulation, Local 675, United Brotherhood of Carpenters and Joiners of America, Applicants v. Tabreo Management Ltd. and **Target Drywall & Acoustics Ltd.**, Responding Parties: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, Applicants v. Tabreo Management Ltd., Target Drywall & Acoustics Ltd. and **PBS General Contractors Inc.**, Responding Parties: The Formwork Council of Ontario, Applicant v. Canadian Construction Workers' Union, **Rock-Base Construction Ltd.** and/or AM & RR Forming Ltd., Responding Parties: Universal Workers Union, Labourers' International Union of North America, Local 183, Applicant v. Canadian Construction Workers' Union, T.A.G.A Contracting Inc. o/a T.A.G.A. Contracting Limited and/or **T.A.G.A. Contracting Ltd.**, T.A.C.S. Construction Ltd., Responding Parties: Universal Workers Union, Labourers' International Union of North America, Local 183, Applicant v. T.A.G.A Contracting Inc. o/a T.A.G.A. Contracting Limited and/or **T.A.G.A. Contracting Ltd.**, T.A.C.S. Construction Ltd., Responding Parties v. Canadian Construction Workers' Union, Intervenor: Universal Workers Union, Labourers' International Union of North America, Local 183, Applicant v. T.A.G.A Contracting Inc. o/a T.A.G.A. Contracting Limited and/or **T.A.G.A. Contracting Ltd.**, T.A.C.S. Construction Ltd., Canadian Construction Workers' Union, Responding Parties: Ontario Council of the International Union of Painters and Allied Trades, Applicant v. Target Drywall & Acoustics Ltd. and **PBS General Contractors Inc.**, Responding Parties.

Certification – Construction Industry – Status – Trade Union – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board

found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

BEFORE: *David A. McKee*, Vice-Chair, and Board Members *John Tomlinson* and *A. Haward*.

APPEARANCES: *B. Chercover* and *Tony Dionisio* for the Canadian Construction Workers' Union; *Manuel Simas*, *Ian Werker* and *Babek Ebrahimzadeh* for PBS General Contractors Inc.; *Michael McCreary*, *Bud Calligan* and *Dario Moriera* for Drywall Acoustic Lathing and Insulation, Local 675; *Michael Horvat* and *Joe Botelho* for Target Drywall & Acoustics Ltd.; *Larry Steinberg* and *Greg Smith* for Ontario Council of the International Union of Painters and Allied Trades.

DECISION OF THE BOARD: March 23, 2007

1. These applications are a series of applications under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act), all of which appeared to revolve around an application for certification, Board File 3156-06-R. That file is an application for certification filed by the Canadian Construction Workers' Union ("CCWU") seeking to represent a bargaining unit of employees of PBS General Contractors Inc. ("PBS"). Many parties sought intervenor status in this application, primarily for the purpose of resisting or attacking the status of the CCWU as a trade union, or more specifically as a trade union as defined in section 126(1). In a series of previous decisions, the Board denied status to all of the other would-be intervenors except, perhaps, for the Ontario Council of the International Union of Painters and Allied Trades ("the Painters") and the Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic, Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America ("the Carpenters").

2. The bases on which the Painters and the Carpenters claimed the right to intervene in the certification application arise out of a number of other applications. Board File 3362-05-R is an application under section 69/1(4) of the Act ("a related/successor application) filed by the Carpenters naming Tabreo Management Ltd. and Target Drywall & Acoustics Ltd. as responding parties, which was filed on January 9, 2007. This was supplemented by a related/successor employer application filed on January 17, 2007, one week after the application for certification, which sought to bind PBS General Contractors Inc. with the other two (Board File 3237-06-R). Board File 3450-06-R is a related/successor application filed by the Painters against Target and PBS General Contractors Inc. Finally, Board File 3238-06-U is an application filed pursuant to section 96 of the Act by the Carpenters against all of the employers, including PBS, who are the responding parties in its related employer application. This application was also filed on January 17, 2007. The parties did not refer in any detail to this section 96 application. We note that it simply recites the same particulars that are found in the related/successor employer application and alleges that those facts constitutes a violation of sections 70, 72 and 73. The CCWU has responded that these particulars do not make out a *prima facie* case.

3. A hearing into this matter was held on March 19, 2007. We commenced by identifying what appeared to us to be the issue, that is whether the certification application or the related employer applications ought to proceed first, and if the certification application were to proceed first, whether or not the Carpenters and Painters would be permitted to participate in the evidence and argument about the status of the CCWU. The position of the CCWU was that the

Board should determine its status as a trade union without reference to evidence or argument of any of the other parties. It ought simply to determine that status by reviewing the documents in the file and coming to a conclusion on the basis of those documents. The Painters and Carpenters Unions took the position that they were prepared to deal with the certification application first, provided that they were granted intervenor status for the purpose of challenging the CCWU's evidence and argument with respect to its status. The CCWU was opposed to that method of proceeding. Target and PBS had no submissions on this issue. In support of their various positions, the parties made a number of arguments with respect to general Board policy, the weight a decision would have in the labour relations community, the need to proceed quickly, the need to avoid duplication, and the effect of the various interventions by each of the union parties in each others' applications.

4. Fundamentally, this is an application for certification. It is in the certification application that the CCWU must prove its status as a trade union, and it is in that file that the Carpenters and Painters wish to attack that assertion of status. If a party has a right to intervene in an application, it has a right to intervene for any and all purposes. Therefore, the first issue to determine was who has the status as parties in the application other than the CCWU and PBS.

5. The Carpenters and Painters assert that they have status because, by virtue of the effect of either subsection 1(4) or section 69, PBS is bound to a collective agreement in both the ICI and residential sectors with them. These collective agreements are for their traditional craft units, that is, all carpenters and carpenters' apprentices, on the one hand, and all painters and painters' apprentices (and others) on the other. The CCWU originally sought to be certified for a bargaining unit of "all construction employees" of PBS in the residential sector of the construction industry in Board Area 8. This is not an appropriate bargaining unit (see *Duron Ontario*, [1976] OLRB Rep. Nov. 734). Presumably the CCWU recognized that fact, and at the Regional Certification Meeting, sought to amend the bargaining unit description to one covering all construction labourers in the residential sector of the construction industry in Board Area 8. In response, the Carpenters (and perhaps the Painters) took the position that there is no appropriate bargaining unit in these circumstances.

6. During argument, the Board asked counsel for the CCWU what the employees were doing on the application date for PBS. He replied that the employers were chipping concrete, performing general clean-up and other general work. PBS took the position that they were digging trenches and holes, preparing for the delivery of concrete, and engaged in general clean-up. Both counsel denied that the employees were performing drywall work, or taping work, of any sort. Regardless of which of these types of work the employees were performing, all such persons would fall into a bargaining unit of construction labourers.

7. For the purposes of this decision, we are prepared to treat the claim of the Painters and Carpenters at its highest, that is, that they would ultimately succeed in the related/successor employer applications and that, at a point prior to January 10, 2007, PBS was bound to collective agreements with both the Carpenters and the Painters for their respective craft units. That is the basis on which the Painters and Carpenters seek to intervene. Neither union has filed membership evidence on behalf of any person who is or claims to be an employee in the bargaining unit.

8. Both the Carpenters and Painters asserted that if the CCWU were certified, that would represent an impairment of their legal rights. Both pointed to certain types of construction work described by the employer and the CCWU (though not all of it), that falls within the work jurisdiction of their respective collective agreements. If that is the case, the Carpenters' and Painters' concerns are not about a conflict of bargaining rights, but a potential dispute over work jurisdiction in future jurisdictional disputes. The Carpenters argued that "clean-up" was covered by their collective agreement, assuming that the clean-up involved refuse created by drywall work. Indeed, the distinction between "trades clean up" and "general clean up" was precisely the subject of a jurisdictional dispute between Labourers Local 506 and a number of trade unions in *Ellis-Don*, [1994] OLRB Rep. Sept. 1222. That case, however, demonstrates the limitation of the Painters' and Carpenters' position. Their interests arise from a potential dispute over work assignment, not over bargaining rights. The Board has long said that it will not determine jurisdictional disputes in the context of a certification for application. Work jurisdiction claims and bargaining rights to represent employees are two different matters: see *Industrial Lighting and Contracting Limited* [1979] OLRB Rep. Oct. 985

9. The certification worksheet does indicate that the Carpenters and Painters challenged the three employees alleged to be in the bargaining unit on the basis that they were not performing bargaining unit work on the date of application. They had no specific submissions to make about the type of work such employees were performing on the hearing date, perhaps because no one's attention had been turned to that specific issue since the date of the Regional Certification Meeting. However, neither Union has any standing to pursue that issue until it can demonstrate a legal interest in the outcome. No trade union has an automatic right to intervene in the certification of another trade union to raise issues not raised by either of the parties to the application. In this case, the employer and the CCWU described the work being performed on the date differently, but it is not a difference into which the Board would ever inquire. Whichever version, or portions of either version, is correct, the persons performing the work fall within a bargaining unit of construction labourers.

10. Therefore, the legal interest of the Carpenters and Painters could not be affected by the success or failure of the certification application brought by the CCWU. Whether or not the CCWU is entitled to represent a bargaining unit of construction labourers, the result in no way affects the legal interests of the Carpenters and Painters to represent their respective craft unit. Therefore, neither has standing to intervene in this application.

11. Since the certification application became a matter between the CCWU and PBS only, there was no purpose in having it heard at the same time as the related/successor employer applications. Those files, and the section 96 application that accompanies them, are adjourned to a later date to be set by the Registrar. In doing this, this panel makes no findings at all about the status of the CCWU to intervene in any of those applications.

12. There are a number of other section 96 applications that are referred to in earlier decisions, but to which the parties did not refer at all in this proceeding. These applications are identified as Board File Numbers 3256-06-R (Rock-Base Construction Ltd., section 66), 3257-06-U (Rock-Base Construction, section 96), 3260-06-R (T.A.G.A. Contracting, section 66), 3261-06-R (T.A.G.A. Contracting Ltd., section 69) and 3263-06-U (T.A.G.A. Contracting Ltd., section 96). These files all deal with other collective agreements or alleged collective agreements between other employers and the CCWU. The Board will deal with those applications in the

normal course and grant whatever relief is appropriate in them. However, none of those employers is one with whom the CCWU asserts it has a collective agreement for the purposes of proving status in this application. Therefore, none of those files are relevant to this determination in this case.

13. We therefore proceeded to deal with the certification application and specifically the issue of status of the CCWU as a trade union within the meaning of section 1(1) and section 126(1). We directed the CCWU to call its evidence in that respect. The evidence of the CCWU came from two witnesses, Warren Sheffer, a lawyer who had performed certain legal work for the CCWU and who attended the founding meeting of the CCWU for the purpose of taking minutes, and Tony Dionisio, currently President of the CCWU.

14. PBS was present during the hearing with counsel. It did not, however, cross-examine any witness or call any evidence of its own. It made no submissions in argument.

15. The facts are as follows. A meeting was held on November 1, 2006 by approximately 30 people. Keith Cooper called the meeting to order and was Chair of the meeting. He conducted the meeting according to an agenda that was distributed to persons at the meeting. All but one of the persons present signed membership cards and took an oath of membership in the CCWU. The meeting then adopted a constitution and elected certain persons as officers: Tony Dionisio as President, Joel Felipe as Vice-President, Joao Dias as Financial Secretary, Keith Cooper as Recording Secretary and Robert Hook as Trustee. Finally, the members present put forward a motion directing the officers of the CCWU to establish the union as one operating in the construction industry.

16. The constitution itself is sufficient to establish the CCWU as a trade union. The objects include the following:

> II (a) (i) To regulate the relations between employees and employers in the construction industry through collective bargaining;
>
> (ii) to organize unorganized workers and to provide an opportunity for every worker to join a free and democratic union;
>
> (iii) to improve the working conditions and living standards of the members and retirees of the union and all Canadians;
>
> (iv) to enter into collective agreements with employers respecting terms and conditions of employment;
>
> (v) to refer members to employment and to otherwise seek to improve the employment relationship of the members.

The powers of the union in Article 3 give the union sufficient authority to carry out these objects. The steps taken at the meeting were all of the steps necessary to formally constitute a trade union, with one exception that is not material. Earlier decisions of the Board required persons who became members before the constitution was adopted to reaffirm that membership after the constitution was adopted. Over the last 30 years, the Board has required only that all of the necessary steps be taken and that "strict adherence to the technically proper sequence of events is not mandatory when all the steps are carried out in a single meeting" (*Local 199 UAW Building Corporation*, [1977] OLRB Rep. July 472 at paragraph 14).

17. The second question is whether the CCWU is a trade union as defined in section 126(1) of the Act, that is, "a trade union that according to established trade union practice, pertains to the construction industry". The constitution of the CCWU certainly identifies its goals and purposes as that of a construction union. In addition to the objects quoted above, Article 4 restricts membership to persons who are:

> (i) working or employed in a bargaining unit in the construction industry that the union is seeking to organize or has organized; or
>
> (ii) is eligible for employment in a bargaining unit in the construction industry that the union is seeking to organize or has organized; or
>
> (iii) eligible for employment in any bargaining unit in the construction industry to which the union, through a hiring hall arrangement or otherwise, provides members for employment purposes; or...

However, as the Board pointed in *Ben Bruinsma*, [1964] OLRB Rep. Feb. 647, the terms of a union's constitution are not sufficient to establish this status. The phrase "established trade union practice" in section 126 must be established by the actions of the union. In *Ben Bruinsma* and earlier cases, the Board looked exclusively at whether or not the union had signed one or more collective agreements in the construction industry. In *Ontario Hydro*, [1997] OLRB Rep. Jan./Feb. 82, the Board said at paragraph 120:

> But most importantly, the one thing that a trade union absolutely must do in order to be a construction trade union is represent at least one bargaining unit of construction employees: that is, a bargaining unit composed at least primarily of construction employees separate and apart from other employees.

The application failed in that case because the applicant could not establish that fact. In *Brick and Allied Craft Union of Canada* [2001] OLRB Rep. May/June 615, the Board found that the BACU was a trade union as defined in section 126 since, out of a large number of collective agreements, one of them was clearly binding on the BACU and its local unions. However, at paragraphs 101-105, the Board suggested that given the circumstances of that union, a finding of one "construction industry" collective agreement clearly in the name of the BACU might not have been necessary to establish that practice.

18. Mr. Dionisio identified three voluntary recognition agreements and one collective agreement arising from the first of the voluntary recognition agreements. At least one member has been referred to employment under that collective agreement. That is sufficient evidence of established trade union practice that pertains to the construction industry to enable the Board to find that the CCWU is a trade union within the meaning of section 126(1). The CCWU relied on other steps it has taken, but given our finding with respect to the collective agreement, there is no need to comment on them.

19. We therefore find that the Canadian Construction Workers Union is a trade union within the meaning of subsection 1(1) and subsection 126(1). It is therefore entitled to bring this application for certification.

20. The Board finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 126 of the Act.

21. The responding party filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act. The response indicated no particular opposition to the application.

22. The Board further finds, pursuant to the parties' agreement, that all construction labourers in the employ of the responding party in the residential sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

23. On the basis of only the information provided in the application, including the information and membership evidence filed by the applicant and the information provided under subsection 128.1(3) of the Act, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant on the date the application was filed. The applicant filed membership evidence on behalf of 2 persons, both of whose names appear on the list of employees submitted by the employer.

24. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. There is nothing raised in the application or the response that would cause the Board to consider directing a representation vote.

25. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

26. The Board is satisfied that it should certify the applicant.

27. Therefore, pursuant to subsection 128.1(13) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of PBS General Contractors Inc. in the residential sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

28. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

2930-04-JD Labourers' International Union of North America, Local 837, Applicant v. International Union of Operating Engineers, Local 793, **Priestly Demolition Inc.** and Dufferin Construction Company, Responding Parties v. Ontario Association of Demolition Contractors Inc., Intervenor.

Jurisdictional Dispute – Reconsideration – The Operating Engineers sought reconsideration of a Board decision confirming the assignment of the demolition of a highway overpass to the Labourers – The IUOE argued that members of a different Labourers local (than the one named in the JD) performed the work in dispute, and consequently the Operating Engineers were unfairly prejudiced in the Board's examination of employer and area practice – The Board held that it traditionally looks at the tradespeople performing the craft, not at representation rights – Similarly, the Board does not assess the skills and experience of individual workers assigned to a project, but looks to the propriety of the work assignment to the particular craft – Finally, the Board held that it was appropriate to consider the same project from both the employer practice and the area practice perspectives; these are different questions, and often the answers to them are not the same – Reconsideration denied

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

DECISION OF THE BOARD: March 2, 2007

1. The International Union of Operating Engineers Local 793 ("the Operating Engineers") brought a timely request for reconsideration of my March 29, 2006 decision in respect of a work assignment. The other parties were given the opportunity to make submissions and did so. The Operating Engineers replied.

2. In a number of cases, the Board has said that the power to reconsider its decisions should be used sparingly because of the need for finality, particularly in relation to adjudication in labour relations. However, the Board has sought to strike a balance, because it also needs to be able to correct decisions that are wrong or were made in error. The power to reconsider is available where there is new evidence that was not previously available, even with the exercise of due diligence, and that new evidence would likely conclusively determine the case. The power to reconsider is also available to provide an opportunity to make representations or objections that a party was not given a chance to make before a decision was rendered (see *K-Mart*, [1981] OLRB Rep. Feb. 185). In addition, the Board has said that it will reconsider when the original decision is wrong at law or raises significant issues of policy or law that the Board failed to adequately address in the decision (see *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096).

3. A significant part of the Operating Engineers' request and reply amounts to a re-argument of the case, but with the benefit of the Board's reasons, with which they disagree. Of course, reconsideration requests are not an opportunity to re-argue a case.

4. The Operating Engineers have, however, raised two points which are appropriate to address. I made an error in respect of area practice: I located two projects in Board Area 26 that fall outside of it. And I did not address an argument made by the Operating Engineers which, at the time it was argued, did not seem significant or compelling. Having regard to the emphasis placed on the matter in the reconsideration request, the argument is more significant to the Operating Engineers than I had appreciated.

The significance about which labourers actually performed the work

5. Priestley Demolition Inc. ("Priestley") is bound to a collective agreement with the Labourers' International Union of North America, Local 837 ("Labourers Local 837") and the work was performed pursuant to that agreement. It is undisputed that Priestley brought workers who are members of Labourers' International Union of North America, Local 506 ("Labourers Local 506") to actually perform the work. They came as travellers, as the collective agreement permits. No members of Labourers Local 837 did any work on the job.

6. The Operating Engineers argue that Labourers Local 837 and Labourers Local 506 are separate unions for the purposes of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act"). Consequently, all of the information before the Board in respect of employer practice, area practice, skill and ability, etc. was evidence about work performed by Labourers Local 506, with the result that there was no persuasive evidence before the Board about the employer practice, area practice, skill and ability of work performed by members of Labourers Local 837. It follows, then, that there was no persuasive evidence to be balanced against the information provided by the Operating Engineers. The Operating Engineers argued that the Board's failure to appreciate that Labourers Local 837 and Labourers Local 506 are separate unions, whose experience and practice cannot be interchanged, amounts to a fundamental error.

7. It is not the least uncommon for employees who are members of one local union to go to work in the geographic jurisdiction of another local union. Unions have negotiated collective agreements that permit employers to "carry" some of their usual workforce when they take on work in the geographic jurisdiction of another local. Unions have recognized that economic booms in one area of the Province may concentrate work opportunities that can and should be shared with tradespeople who live elsewhere. Unions understand that they must be prepared to accept travellers to meet a contractor's demand for large crews for a concentrated period on a large project.

8. The Board has long been aware that construction trade collective agreements provide for worker mobility. But the Board has never taken into account whether someone other than members of the local union worked on the project in the context of a jurisdictional dispute. And there seems no good reason to do so.

9. While the Board does recognize that Labourers Local 506 and Labourers Local 837 are separate unions, the tradespeople who belong to each union are all performing the craft of labourer. The Board has consistently said that determinations about work assignment brought

pursuant to section 99 of the Act, are determinations about craft jurisdiction, not about representation rights. To put the matter simply, in the case before me, the Board is determining whether the work at issue was properly assigned to the craft of labourer or whether it should have been assigned to the craft of operating engineer. In making that determination, it is not relevant to determine which members of which local union pertain to the craft that actually performed the work.

10. If the Board were to accept the argument of the Operating Engineers in this case, we would be severely hampered in our ability to consider employer practice across the Province. Local unions in the construction trade are typically organized along geographical lines. Restricting the Board to considering only the experience and skills of the local union in the geographical area where the work was performed would eliminate much employer practice, which has typically been an important factor, along with area practice, in determining work assignment disputes.

11. I am also not convinced that much insight would be gained by relying on the experience of a local union only in circumstances where the members of the local union itself have performed the work. The Board has never assessed the particular skills and experience of the workers who are assigned to any project. The Board assumes that unions routinely meet their obligations to refer only members who have the skill and experience to perform the work safely. The suggestion of the Operating Engineers that the Board more closely examine which tradespeople actually performed the work invites representations that the Board actually determine whether particular workers, as opposed to the craft, possess the skill and ability to perform the work in issue.

12. For those reasons, I decline to look behind the fact that labourers who worked on the job under the auspices of Labourers Local 837 performed the work and, therefore, I rely on all of the previous projects performed by Labourers Local 837.

Error about the location of two projects

13. In paragraph 31 of the March 29, 2006 decision, I wrongly located the Elgin Mills bridge and Franklin Street bridge projects performed by Labourers Local 837 in Board Area 26. They are not, and so cannot be relied on as area practice favouring Labourers Local 837.

14. The Operating Engineers also submitted that the Board should not have relied on the project we called Phase One - the identical work, performed by the same general contractor and the same subcontractor, with the Labourers Local 837 - because that project had already been counted as employer practice. That is not double counting. The Board is asking two different questions: how has this employer assigned the work in the past, in this sector across the Province, and how have employers working in this Board area assigned the work in the past? We are interested in the answer to each question, and the answers are often not the same.

15. The Operating Engineers point out that when the Elgin Mills and Franklin Street bridge projects are taken out of area practice consideration, the Operating Engineers can point to more jobs, and therefore, the factor of area practice favours the Operating Engineers.

16. But the Operating Engineers are still left with the very significant problem that the identical work, Phase One, was performed without challenge. At paragraphs 14 to 18, the Board specifically addressed this issue, before turning to the factors the Board routinely considers. At paragraph 18, I concluded:

> The Operating Engineers have asked that the parties opposite not be able to rely on the assignment in Phase One. I conclude that the subcontracting by Dufferin to Priestly and the performance of the work by the Labourers in Phase One ought to count, and it will count heavily against the Operating Engineers. Although the work was actually performed over a single day, the project was significant, conspicuous and well known to be only the first of a two-phase project and one of many bridges that would require similar work. The Operating Engineers' failure to advance a claim to the work in those circumstances is significant.

17. The problem for the Operating Engineers, put simply, is that there was no factor or information that was important enough to cause the Board to disrupt a work assignment made to Labourers Local 837 that was identical to a work assignment made one year earlier which the Operating Engineers had not contested.

Disposition

18. I decline to reconsider my decision of March 29, 2006.

2966-03-ES; 3389-03-ES; 3390-03-ES Govin Misir, a Director of **SLMsoft Inc.**, Applicant v. Murat Tayfun Can et al. and Director of Employment Standards, Responding Parties; Eddie Law, a Director of **SLMsoft Inc.**, Applicant v. Murat Tayfun Can et al. and Director of Employment Standards, Responding Parties; Dr. Budhendranauth Doobay, Director of **SLMsoft Inc.**, Applicant v. Murat Tayfun Can et al. and Director of Employment Standards, Responding Parties.

Employment Standards – Fraud – Settlement – Twenty-three claimants had reached a settlement with one of three directors of SLMsoft Inc. – A term of the settlement released all three directors from any obligations, upon receipt of the entire payment by the director who signed the settlement – The payment was never made – The Board determined that the term of the settlement forfeiting the employees' entitlement to seek relief from directors only arose upon payment of the money – The Board also found that a director's purported letter of resignation was fraudulent and that it induced the claimants to enter into the settlement – Pursuant to s. 120(5) the claimants were entitled to an order voiding the settlement agreement on the basis of fraud – Matter re-listed for Hearing

BEFORE: *Tanja Wacyk*, Vice-Chair.

APPEARANCES: *David S. Steinberg* and *Jonathan L. Rosenstein* (on the issue of fraud only) for the applicants; *Murat Tayfun Can, Eddy Mariotti* and *Peter Spenler* for: *Terry Campbell;*

Boris Sountsov; Brendan Abreu; Chunwu Hui; Chandra Manohar; Ghada Yehia; Senthooran Kularajasingham; Gang (Luke) Du; Gregory Fernandes; Brendan Abreu; Ding Yi; and, Li Qian/Chunwu Hui, as well as themselves; *Sean Holman* for himself and *Yiyue (Rebecca) Sun; Khalid Butt* for himself; *Alexandra Bednar* for the Director of Employment Standards.

DECISION OF THE BOARD: April 23, 2007

1. These are three applications for review pursuant to section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "Act"). The applications have been brought by three directors of SLMsoft Inc., who have been ordered to pay outstanding wages to former employees of SLMsoft Inc. The Orders are for $2,814,146.41 and are made against each of the applicants jointly and severally, pursuant to section 81 of the Act.

2. On June 2, 2005, pursuant to section 120 of the Act, twenty-three claimants, representing about 50% of the beneficiaries of the Orders to Pay, entered into a Settlement Agreement (the "Settlement" or "Settlement Agreement") with the assistance of a labour relations officer. The claimants who were signatories to the Settlement (the "signatories") are: Roxana Bancea, Warren D'Souza, Boris Sountsov, Chandra Manohar, Terry Campbell, Brendan Abreu, Murat Tayfun Can, Oy Sze, Clara Kwok, Eddy Mariotti, Peter Spenler, Sanjiv Dohbal, Gregory Fernandes, Sujoy Ghosh, Senthooran Kularajasingham, Naraya Ramakrishnan, Ghada Yehia, Joseph Chan, Gang Luke Du, Rose Chen, Yi (Jenny) Ding, Khalid Butt, Li Qian/Chunwu Hui. Govin Misir was the only director who signed the settlement.

3. In light of the Settlement, I issued a decision, dated June 16, 2005, acknowledging the Settlement, and in keeping with the terms of the Settlement, adjourning these applications as they relate to the signatories, *sine die*, for a period not exceeding one year. I also indicated that the applications, as they relate to those same signatories, shall terminate without notice to the parties, in accordance with subsection 120(4) of the Act, when the parties do what they have agreed to do under this Settlement, or one year from the date of my decision, whichever occurs first, unless a party requests that the Board list these applications for hearing before they are terminated.

4. No payments were ever made pursuant to the Settlement, and at the request of the Ministry, the matter was re-listed for hearing prior to the expiration of the one year referred to in my June 16, 2005 decision.

5. The Ministry and the signatories now ask me to void the Settlement. They maintain the signatories entered into the Settlement as a result of fraud or coercion. However, their evidence and submissions focussed primarily on the allegation of fraud and consequently this decision does not deal with the allegation of coercion. They also argue that, in any event, in light of Mr. Misir's failure to make the payments required by the Settlement and the express terms of the Settlement, they are not, and should not be precluded from seeking enforcement of the Employment Standards Officer's Orders against the three applicants. I will deal with each argument in the in which they were argued.

THE TERMS OF THE SETTLEMENT AGREEMENT:

6. The Settlement Agreement, dated June 2, 2005, provides as follows:

SETTLEMENT AGREEMENT

1. The Employer's Directors applied for review of Orders to Pay No. 04678 & 04680 & 04679 dated November 24, 2003 & November 26, 2003.

2. In order to resolve this matter, the Employees and the Employer's Directors above agree as follows:

Schedule "A"

1. Govin Misir will pay the other parties to this Agreement ("the former employees") a total of $100,000.00 (one hundred thousand) payable to the Director of Employment Standards in trust, in two instalments, as follows:

(a) $50,000.00 (fifty thousand) on or before August 31, 2005; and,

(b) $50,000.00 (fifty thousand) on or before October 31, 2005.

2. The Director of Employment Standards shall pay each of the former employees who are parties to this Agreement from the total payable by Govin Misir, as per para. 1, above, an amount as set out in the attached schedule "B" equal to their pro rata share of the total. For greater certainty, the Ministry of Labour shall make these payments to these former employees out of the funds paid into trust by Govin Misir as per para. 1, above, and shall have no independent liability therefor.

3. Late payments by Govin Misir shall accrue interest at the rate of 8% per annum, being simple interest, on any outstanding amount payable hereunder. For greater certainty, Govin Misir, and not the Director of Employment Standards, shall be responsible for paying any such interest.

4. Subject to paragraph 3 of the Settlement Agreement to which this is attached as Schedule A, the former employees who are parties to this Agreement shall withdraw their complaints and/or claims, as the case may be, against Govin Misir, Eddie Law, and Dr. Budhendra Doobay in these proceedings.

5. Upon receipt of the second instalment payment referred to in para. 1, above, the former employees who are parties to this Agreement do release each and all of Govin Misir, Eddie Law and Dr. Budhendra Doobay from any and all claims, complaints, suits or

> demands of any kind relating in any way or arising from or in connection with their employment with SLMSoft. com Inc. in respect of any and all claims, complaints, suits, or demands, past, present or future, whether or not now known, or which may become known in future.
>
> 6. The parties hereto shall maintain the confidentiality of the terms of this Agreement and shall make no disclosure thereof to any non-party except as required by law, including court order. All parties hereto recognize and affirm that any breach of this provision shall constitute a breach of this Agreement, for which they may be held liable by a court of competent jurisdiction.
>
> 7. This Agreement may be signed in counterparts and each counterpart shall constitute an original of this Agreement.
>
> 8. This Agreement constitutes the entire agreement between the parties hereto. There are no other promises or representations made by any party hereto save and except for those specifically contained herein.
>
> ("Signatures")

3. The parties to this Agreement agree that this settlement resolves all issues in this application as between the former employees who are parties hereto and Govin Misir, Eddie Law, and Dr. Budhendra Doobay and further agree to request the Board to adjourn this application *sine die* for a period not exceeding one year on the condition that this application for review shall terminate without notice to the parties in accordance with section 120(4) of the Act when the parties do what they have agreed to do under this settlement or one year from the date of the Board's decision, whichever occurs first, unless a party requests that the Board list this application for hearing before it is terminated.

4. This application in respect of the former employees who are not parties hereto, is adjourned to a date to be fixed by the Registrar. The Director of Employment Standards and Govin Misir, Eddie Law, and Dr. B. Doobay request that the hearing of this application be scheduled for a date in or after January, 2006.

Signed at TORONTO this 2nd day of June, 2005.

("Signatures")

EFFECT OF THE SETTLEMENT:

7. With regard to the issue of the effect of the Settlement, the argument of the parties focussed primarily on whether the signatories could continue to seek enforcement of the Orders against Eddie Law and Dr. Budhendranauth Doobay.

Submissions on Behalf of the Applicants:

8. The directors maintain the Settlement is a binding contract and precludes enforcement against all three of them. They submit the Ministry's request to have the matter re-listed with regard to the signatories should be denied.

9. The directors argue that the consequence of a breach of the Settlement is that the Board can issue an order to enforce Mr. Misir's obligations under the Settlement. Such an order may be filed by the Director of Employment Standards in court, and pursuant to section 126, may be enforced in the same manner as an order of the court. Section 126 provides:

> **126.** (1) If an order to pay money has been made under this Act, the Director may cause a copy of the order, certified by the Director to be a true copy, to be filed in a court of competent jurisdiction.
>
> **Advice to person against whom order was made**
>
> (2) If the Director files a copy of the order, he or she shall serve a letter in accordance with section 95 upon the person against whom the order was issued advising the person of the filing.
>
> **Certificate enforceable**
>
> (3) The Director may enforce an order filed under subsection (1) in the same manner as a judgment or order of the court.
>
> ...

10. The directors submit that the terms of the Settlement are clearly set out, with the purpose, as indicated in the preamble, to "resolve this matter".

11. The directors point out that the Settlement is an agreement between the signatories and Govin Misir only. Mr. Misir is the only payor, and the only one to assume that obligation. They emphasize that Mr. Law and Dr. Doobay are not contracting parties, but rather, "third party beneficiaries". They point to the reference to Mr. Misir being the responsible party rather than the Ministry, set out in paragraph 2 of Schedule A, and submit this reinforces the exclusive liability of Mr. Misir.

12. The directors also point out that while it is clear from the Settlement that the funds are to be paid by Mr. Misir in two instalments, the parties also turned their mind to the contingency that this may not occur. The directors maintain that risk is addressed in paragraph 3 of Schedule A of the Settlement, which clearly contemplates that payment may be late, and if so, accrues interest. The directors further point out that the interest rate is set at the rate of "8% per annum", which demonstrates the parties contemplated such a delay in payment could be a year or more.

13. The directors further rely on paragraph 4 of Schedule A, which states that the signatories will withdraw their complaints and/or claims against all three applicants. They maintain that undertaking is clear and unequivocal. They concede this undertaking is "subject to paragraph 3 of the Settlement Agreement…", but maintain that is simply stock language which resolves all issues between themselves *qua* employees, and the applicants. The applicants argue that consequently, pursuant to subsection 120(4), this provision means that their appeal will lapse within one year, unless one of the parties brings the hearing back on, either to enforce the agreement, or set the agreement aside because of fraud. The applicants maintain there is no other condition for withdrawal.

14. Subsections 120(4) and (5) provide:

> (4) If the parties to a settlement under this section do what they agreed to do under the settlement,
>
> (a) the settlement is binding on the parties;
>
> (b) if the review concerns an order, the order is void; and
>
> (c) the review is terminated.
>
> (5) If, upon application to the Board, the employee demonstrates that he or she entered into the settlement as a result of fraud or coercion,
>
> (a) the settlement is void;
>
> (b) if the review concerned an order, the order is reinstated; and
>
> (c) the review shall be resumed.

15. With regard to paragraph 5 of "Schedule A", the applicants concede that the release is conditional on the receipt of the second instalment payment. They argue this simply means that until the signatories receive the monies, they are entitled to pursue the enforcement of the Settlement.

16. The applicants argue that the only other relevant provision is paragraph 8, which states that the Settlement Agreement constitutes the entire agreement between the parties, in that there are no other promises or undertakings upon which the parties can rely.

17. The applicants maintain that based on the terms of the Settlement, I must find that the signatories have withdrawn their claims against all three applicants, and that the Settlement resolves all issues between the parties. The applicants maintain that in effect, the signatories are asking for a right to resile from the agreement they entered into. However, the applicants maintain the Settlement and law are clear they cannot do so. Rather, the applicants argue that the signatories' remedy is to seek enforcement of the Settlement.

18. In support of their position, the applicants relied on the Board's (differently constituted) decision in *1008810 Ontario Ltd. (c.o.b. Fit for Life)*, [2004] OLRB Rep. Sep./Oct. 943. In that case, the Board considered the consequences of breaching a settlement of an employment standards complaint which had been arrived at with the assistance of a labour relations officer.

pursuant to section 120 of the Act. The Board held that a breach or repudiation of a settlement agreement by an employer does not automatically result in the settlement agreement being set aside, so as to afford the employee the right to continue the proceeding as if there had been no settlement. Rather, the Board determined that, in that case, it would uphold the settlement by issuing orders to remedy the breach, or repudiation.

19. The applicants point to paragraph 31 of the *Fit for Life* decision, which deals with the fairness of that approach:

> 31. A settlement agreement is a form of contract. It is the essence of the law of contract to encourage parties to enter freely into agreements with respect to their obligations to each other by promoting the finality and certainty of those agreements. In general, each party is not only required to honour the commitments which they have made under a contract, but they are required to accept what they have agreed to receive from the other party as fully discharging the other party's commitment under the contract. The remedy for a breach by one party is an order putting the other party in the same position that they would have been in had the first party done what they agreed to do. The law of contract provides exceptions from this strict result only when fairness requires it.

20. The applicants further submit that the Board made it clear in paragraphs 34 and 35 of the *Fit for Life* decision that even in the event of a fundamental breach of a settlement – the settlement still supersedes the original claim:

> 34. By contrast, the failure of one party to do what he or she agreed to do does not require the settlement to be set aside, even if the failure amounts to a fundamental breach. It is not the deal itself that is thereby unfair, but rather the failure of one party to do what he or she agreed to do which is unfair, and must be remedied. The innocent party is entitled to a remedy for the breach. If the breach is fundamental, going to the root of the settlement, as when a party indicates they have no intention of performing the settlement, the innocent party is entitled to treat the settlement as repudiated, and is relieved of performing any prospective obligations under the settlement. The settlement, however, continues to remain relevant for the purposes of assessing the damages that the innocent party is entitled to receive. Damages may be claimed both for past breaches and, in an appropriate case, arising out of the prospective obligations of the other party. Neither the principle of breach of contract nor the doctrine of repudiation would result in the settlement being set aside and the *status quo ante* being restored; the current Act, unlike the former act, does not dictate that it is to be set aside. I note that this is also congruent with the common law in relation to settlements: the settlement supersedes the original claim, and the original claim is thereby spent.
>
> 35. In my view this is also consistent with the purpose and broader structure of the Act. The purpose of the Act is not only to protect individual employees, and in particular non-unionized employees, from their unequal bargaining position in relation to their employers by providing certain statutory minimums, but also to secure prompt, final and binding resolution of disputes with respect to those rights and entitlements under the Act. While parties may not contract out of entitlements under the Act (section

> 5(1)), the Act contemplates that disputes about entitlements will be resolved through settlements orchestrated by labour relations officers (section 120). Hundreds of disputes are resolved in this manner every year. The resulting settlements usually represent "a compromise in which neither side achieves as much or risks as much as it would by proceeding to a hearing" (to adopt a phrase used by the Board in *Brantwood Manor Nursing Homes Limited* [1984] OLRB Rep. March 415 with respect to settlements under the Labour Relations Act). This settlement process is consistent with the Act's purpose of ensuring prompt, final and binding resolution of disputes. The settlement process, and the role assigned by the Act to labour relations officers, would be significantly undermined if the resulting settlements were not given effect when ever [sic] possible. An interpretation of the Act that upholds the finality of settlements of disputes under the Act is therefore consistent with the purposes of the Act.

21. The applicants point out that the Settlement Agreement in *Fit for Life* contains much of the same language as in the instant case, including paragraph 3, which states that the Settlement resolves all issues in the application, and reserves the right of the parties to have the matter re-listed. In that instance, the Board had also made a similar order acknowledging the settlement between the parties, adjourning the matter *sine die*, and indicating the application would terminate when the parties did what they agreed to do pursuant to the settlement, or one year from the date of the Board's decision, unless a party requested that the Board list the applications for hearing before they were terminated.

22. The applicants submit that the Board's decision in *Fit for Life* is correct, and point out the decision has been followed in a number of other Board cases. (See: *1284865 Ontario Inc. (c.o.b. System Sound Bar)*, [2006] O.E.S.A.D. No. 303 (March 29, 2006); *Vio Systems Inc. (c.o.b. Vio Ecowater Systems*, [2006] O.E.S.A.D. No. 151 (February 7, 2006); *A G Regency Travel Inc.*, [2005] O.E.S.A.D. No. 1060 ((October 27, 2005); *Business Skills Inc.*, [2005] O.E.S.A.D. No. 1023 ((October 20, 2005); *Transport Training Centre of Canada*, [2003] OLRB Rep. May/June 486.)

23. They point out that the signatories in this instance are not left empty handed, and can move to enforce the Settlement pursuant to section 126, set out above in paragraph 7.

Submissions on behalf of the Director of Employment Standards (the "Ministry") (Concurred with by the Signatories):

24. The Ministry presented a two-pronged argument.

Interpretation Of The Settlement Agreement

25. The Ministry submits that if the Settlement Agreement is to be viewed as a contract which is binding on the parties, then the Board must ask whether the signatories intended to absolve the other two directors, Mr. Law and Dr. Doobay, in all circumstances. The Ministry maintains this is clearly not the case, as is demonstrated by clauses #4 and #5 of "Schedule A" to the Settlement. The Ministry submits that a clear reading of those provisions is that the Settlement will resolve all issues unless the parties don't do what they agreed to do – as is the case here. The other precondition is that the matter be re-listed, and the Ministry submitted that

that condition has been met as well. According to the Ministry, anyone reading those provisions would think the Settlement resolves all the issues only if the payments are made and the matters not re-listed.

26. Similarly, the Ministry submits that paragraph 5 states that the three applicants will be released from any and all claims etc., only after the second instalment payment is made. The Ministry maintains that an ordinary person would understand that to mean that if the payments are not made, then the applicants are not released. The Ministry maintains the language of the Settlement is more consistent with that interpretation, rather than the applicants' position that there was an immediate and unconditional absolution of directors Law and Doobay as soon as the Settlement was executed, and without regard as to whether any payments pursuant to the Settlement were forthcoming or not.

27. The Ministry submits that such an outcome would require much clearer language indicating that this was the intent. The Ministry argues this is particularly the case in light of the remedial character of the *Employment Standards Act*, which is designed to protect workers.

28. The Ministry further argues that such a result would be contrary to a provision of section 81 of the Act, which states that directors are jointly and severally liable for wages. The Ministry points out that pursuant to section 5 of the Act, employers and employees cannot contract out of the provisions of the Act, and any such contracting out or waiver is void. The Ministry suggests that one might well ask why directors, who are jointly and severally liable, should be able to agree amongst themselves that only one of them will be liable for unpaid wages, when this is to the detriment of the employees who are owed wages.

29. The Ministry points out that the Supreme Court of Canada has stated that since the Act is benefits conferring legislation to protect employees, restrictive approaches, inconsistent with the goals of the legislation, are to be avoided. (see: *Regina v. Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2 (C.S.C.) (QL).

Fairness Of The Settlement

30. The Ministry further submits that even if I were to find that the Settlement Agreement as written absolves the other two directors of any further liability, I should not condone or endorse such an unfair and unconscionable agreement.

31. The Ministry submits I should ask whether it is fair that signatories would sign an agreement in good faith, with every expectation that they would be paid, and in so doing absolve two other directors who may have the ability to pay. The Ministry argues that to presume they intended such a result is absurd. Rather, the signatories came to the Board in search of unpaid wages, not to grant favours or bestow absolution on two of the three directors.

32. Further the Ministry points to the absence of any *quid pro quo* on the part of applicants Law and Doobay, for the signatories absolving them of any further liability.

33. The Ministry also indicated there is authority for the proposition that a Court should not enforce settlements which are manifestly unfair or which offend its sense of justice. The Ministry referred me to the following cases in which courts have refused to enforce agreements: *Milios v.*

Zagas, [1998] O.J. No. 812 (Ont. C.A.) (QL); and, *Fox Estate v. Stelmaszyk*, [2003] OJ. No. 2619 (Ont. C.A.) (QL). The Ministry argues that it would be very strange if the Superior Court has the jurisdiction to do what is fair to parties and this Board does not.

34. The Ministry submits that in this instance, *Fit for Life*, and the other cases referred to by the applicants, should not be relied on because of the specific features of this case – the most salient distinguishing feature being that liability extends beyond a single employer and claimant. The Ministry argues that simply enforcing the settlements in *Fit for Life*, and the cases that followed, did not have the onerous effect of preventing the claimants from seeking redress from others who were liable under the Act, and the signatories would be in no worse a position if those settlements were enforced than they would have been had the employers honoured the settlements. The Ministry submits that at its highest, the decisions in *Fit for Life* and those following it, stand for the proposition that if there has been non-compliance with a settlement agreement, the Board has the discretion to simply make an order enforcing the settlement.

35. The Ministry argues that to follow *Fit for Life* in this instance would have the unfortunate result that two applicants who may have the ability to pay unpaid wages would be absolved from liability while an Order was made against one who would appear to have no ability nor intention of paying pursuant to the Settlement. The other result, according to the Ministry, would be that the intention of the Act to make directors jointly and severally liable for unpaid wages would be subverted.

36. Lastly, the Ministry points out there will be no judicial economy in simply enforcing the Settlement as written, because the claims of those who did not sign the agreement will still be proceeding to hearing. Finally, the Ministry argues that it would be odd if those who did not attend the initial day of hearing, and did not sign the agreement, would be in a better position than those who did come in the interest of pursing their entitlement.

37. The Director of Employment Standards requested an Order voiding the Settlement Agreement and setting the matter down for a hearing involving all of the signatories and all three applicants.

38. The Ministry did concede that the agreement of the signatories to the Settlement to limit Mr. Misir's liability to $100,000.00 regarding their claims may be relevant in assessing damages against him – but left that my discretion.

Applicants' Reply:

39. The applicants agreed that paragraph 5 of Schedule A indicates that no releases will occur unless payments are made, but argued that is not the same as the signatories saying they retain the right to enforce the Orders or retain the right to resile from the Settlement, and ask me to enforce the Order. Rather, a release simply means they will not take any further action asserting they have not received the wages owed to them.

40. The applicants also indicated that they make no comment regarding whether it was the intent of the signatories to "absolve" the other two directors. Rather, they maintained that the issue is the liability of the other two directors in law. In that respect they submitted the

Settlement is clear that the intent of all the signatories was to proceed no further in respect of the Orders.

41. The applicants disagreed that the parties cannot contract out of the Act, and pointed to section 120 of the Act (set out further below).

42. The applicants also denied having agreed amongst themselves to limit their liability. Rather, they argue that agreement was made between the signatories and Mr. Misir when they entered into the Settlement.

43. The applicants further maintained that the lack of consideration does not preclude them from being third party beneficiaries, and argued they are entitled to the benefit of the bargain as long as the bargain is enforceable. They submitted that arguably, Mr. Misir would not have agreed to enter into the Settlement if the signatories had not agreed to withdraw their complaints against all three applicants.

44. In the alternative, the applicants argued that if they are found to be parties to the contract, then the consideration would be that they agreed not to continue their applications for review. The applicants point out there is no assumption their applications would fail – and if the Orders were rescinded the signatories would get nothing.

45. The applicants further submitted that the fact there are three of them is irrelevant. Rather, they maintained that it is the terms of the Settlement that govern the situation. They also point out that in the *Fit for Life* decision, the claimant's remedy was enforcement of the settlement, but she did not get her "wish list".

Analysis:

46. I begin by addressing the Ministry's argument, supported by the signatories, that the Act prohibits a settlement which may compromise employees' statutory entitlements.

47. As argued by the applicants, section 120 is the applicable provision. It provides as follows:

> **120.** (1) The Board may authorize a labour relations officer to attempt to effect a settlement of the matters raised in an application for review under section 116.
>
> **Certain matters not bar to settlement**
>
> (2) A settlement may be effected under this section even if,
>
> (a) the employment standards officer who issued the order or refused to issue the order does not participate in the settlement discussions or is not advised of the discussions or settlement; or
>
> (b) the review under section 116 has started.

Compliance orders

(3) A settlement respecting a compliance order shall not be made if the Director has not approved the terms of the settlement.

Effect of settlement

(4) If the parties to a settlement under this section do what they agreed to do under the settlement.

(a) the settlement is binding on the parties:

(b) if the review concerns an order. the order is void: and

(c) the review is terminated.

Application to Void settlement

(5) If. upon application to the Board. the employee demonstrates that he or she entered into the settlement as a result of fraud or coercion.

(a) the settlement is void:

(b) if the review concerned an order. the order is reinstated: and

(c) the review shall be resumed.

48. While section 120 does not expressly allow for "contracting out". it does provide that orders are voided by settlements once the parties have executed the settlement. The result is that regardless of what the final determination might have been had the matter been adjudicated. the parties have the right to make their own determination regarding whether they should enter into the settlement.

49. In some instances. the decision to do so may represent a conscious choice by claimants to take less than what they may be entitled to. However. this may be advantageous to them in other ways. such as not having to take time off work to attend a hearing. In other instances. the claimants may not be confident of their success at a hearing. and they may prefer the certainty of a negotiated result. To find that the Act does not allow for settlements that may compromise rights in any way would render useless those provisions of the Act which allow settlement i.e. 112(1)(c). 120(4)(b) and 129(3) (See paragraph 35 in *Fit for Life*).

50. Consequently. I find that the parties to a dispute under the Act are entitled to enter into a settlement that may not reflect their strict entitlements under the Act. in the event the matters were adjudicated and they were entirely successful. In this instance. the fact the signatories agreed to a settlement that abandoned their right to pursue their claim against Mr. Law and Dr. Doobay. does not. in and of itself. render the Settlement unenforceable.

51. Further. while the Ministry is correct that there is authority for the proposition that a court should not enforce settlements which are manifestly unfair or which offend its sense of justice. the cases relied on by the Ministry are of little assistance in the instant case. They all turn on the Court's discretion pursuant to Rule 49.09 of the current *Rules of Civil Procedure*. R.R.O. 1990. Reg. 194. as amended. which expressly grants judges the discretion to determine whether to enforce a settlement. However. as stated by the Board in *Fit for Life* at paragraph 25:

> 25. Proceedings under this Act are not civil proceedings and are not subject to the Rules of Civil Procedure. The Act contains no provision comparable to rule 49.09 of the Rules of Civil Procedure, nor do the regulations to the Act.

52. That being said, section 120(4) makes a settlement binding only when the parties have done what they agreed to do pursuant to the settlement. Consequently, the Board has discretion to determine whether it will give effect to the agreement of the parties. As stated in *Fit for Life* at paragraph 30:

> ... the mere fact that one of the parties has not done what it agreed to do does not automatically render the settlement null and void. While it is true that it has not been made "binding" upon the parties by virtue of their having done what they agreed to do, the settlement agreement continues to exist. Upon the resumption of the review before the Board, the Board **may** make an order to give effect to the agreement of the parties, and remedy its breach. [emphasis added]

53. In determining whether it should give effect to a settlement agreement, it is appropriate for the Board to consider factors which include: the intentions of the parties; the remedial purpose of the Act; and, the merits of securing prompt, final and binding resolution of disputes under the Act.

54. In this instance, more than one and one-half years had passed from the time the parties entered into the Settlement Agreement, and at the time these issues arose, no payment having been made by Mr. Misir. Consequently, I find that Mr. Misir has demonstrated that he is not prepared to do what he had agreed to do under the Settlement. Consequently, the issue becomes whether the Board should give effect to the settlement, or allow the applications, as they apply to the signatories, to be re-listed for hearing on the merits.

55. I am persuaded that the most appropriate result in this instance is that the applications, as they apply to the signatories, be re-listed for hearing on the merits.

56. I agree with the Ministry, that in light of the remedial character of the legislation, it must be clear that it was the intention of the signatories to forfeit their entitlement to seek enforcement of their claims against Mr. Law and Dr. Doobay, even if Mr. Misir fails to do what he agreed to do under the Settlement.

57. In this instance, I find the applicants' proposed interpretation of the terms of the Settlement too formalistic, particularly in the context of the remedial nature of the Act. Rather, I conclude that the terms of the Settlement are more supportive of a finding that the signatories undertook to withdraw their claims against, and provide a release to the applicants, only once Mr. Misir paid the second instalment required under the Settlement.

58. I reach this conclusion by reading paragraph 4 of Schedule A, in which the signatories agree that they "**shall** withdraw" their claims etc., in combination with paragraph 5, in which they undertake to release the three applicants **upon receipt of the second instalment payment.** If it had been the intention of the signatories to withdraw their claims against all three applicants immediately upon execution of the Settlement, this could have easily been captured by simply stating the withdrawal in the present tense i.e. the signatories "withdraw" their claims etc.

Instead, however, they used the future tense, "will withdraw" and make that undertaking subject to their right to have the matter re-listed for hearing, which they now wish to do.

59. Having found that it was not the intention of the signatories to forfeit their claims against both Mr. Law and Dr. Doobay in the circumstances, it is appropriate those applications be re-listed.

60. This leaves the issue of the appropriate disposition of the Settlement with regard to Mr. Misir. In the circumstances, and in light of my determination with regard to the issue of fraud, set out below, I decline to enforce the Settlement against Mr. Misir, and find it is appropriate that his application also be re-listed for hearing in its totality.

FRAUD:

61. Gang (Luke) Du, Yi (Jenny) Ding, Li Qian (signed on behalf of her husband, Chunwu Hui), and Eddy Mariotti, signatories to the agreement, as well as Mr. Steinberg, counsel for the applicants, all testified with regard to what occurred on June 2, 2005, the date on which the Settlement Agreement was signed. While varying somewhat on the fine details, based on their evidence, I find the following occurred that day.

62. Although the matter had been set down for hearing on June 2, 2005, the parties, with the assistance of a Labour Relations Officer ("LRO"), engaged in settlement discussions. The LRO initially met with the parties separately.

63. During the course of their discussions, David Steinberg told the LRO that he had been advised by his clients that Mr. Misir had previously arranged affairs so that he was judgement proof. In addition, Mr. Steinberg conveyed to the LRO, Mr. Law's advice that: he had few assets, the primary one being the family home, of which he owned only 1/3, while his wife and mother-in-law owned the remaining two thirds; that he had two teenaged children living at home; and, that he was unemployed at the time. Mr. Steinberg also informed the LRO that he had been advised that Dr. Doobay resigned from the Board in 2002, and would maintain that he was not a director if the matter went ahead.

64. This information was conveyed to the signatories by the LRO. The signatories were also presented with a document purported to be Dr. Doobay's letter of resignation as a director of SLMsoft.com. The letter was dated December 1, 2002; was written on what appeared to be Dr. Doobay's letterhead from his medical practice; and, appeared to be signed by Dr. Doobay. It contained no address for the addressee but stated:

> Dear Govin,
>
> Due to my increasing responsibilities at the Museum of Henderson and the Temple, I regret to inform you I tender my resignation as a Director of SLM soft.com immediately.
>
> If I can be of any further help, please feel free to contact me.

65. This letter was presented to the signatories by the LRO, who the signatories understood had been given the letter by Mr. Steinberg. After the letter was circulated, someone

asked if anyone had any contrary evidence, demonstrating that Dr. Doobay was still a director at the time liability for the wages found owing to the claimants arose. No one did.

66. Mr. Steinberg then met with the signatories at the LRO's invitation. He either repeated or affirmed the information he had conveyed to the LRO, set out above. He also indicated that he thought it would be very difficult to order a sale of Mr. Law's home in the circumstances, but could not recall if he stated this only to the LRO or to the signatories as well. He specifically recalled telling the signatories that he had been advised by Dr. Doobay that he had resigned and would maintain that position if the matter went to hearing.

67. In spite of the above, the LRO, and/or Mr. Steinberg, also indicated that Mr. Misir had offered $100,000 to be divided by the claimants in attendance to settle their claims.

68. Mr. Steinberg then rejoined the applicants in the other room. Some time later, the LRO joined them and indicated their offer had been accepted.

Evidence:

Signatories

69. Gang (Luke) Du, Yi (Jenny) Ding, Li Qian, and Eddy Mariotti testified that because they understood that Mr. Misir was judgement proof, and that Mr. Law had few assets, they had relied on Dr. Doobay, as the director with assets, to satisfy the Orders. While they were surprised to hear he was not a director, they had no evidence to contradict the letter of resignation. Nor did it occur to them that the letter was not genuine. They testified that consequently, they felt they had no choice but to accept the settlement offer, as they felt they stood to receive nothing if they litigated their claims. Mr. Mariotti also testified that he wanted "closure".

70. There also appeared to be some misunderstanding amongst some of the signatories, that the $100,000.00 being offered in settlement by Mr. Misir was already secure in a trust account of some sort, and that consequently, they were certain the funds were available for the purpose of satisfying the Settlement However, it appears this confusion resulted from the reference in the Settlement Agreement to the monies being paid by Mr. Misir to the Director of Employment Standards "in trust", rather than any misinformation conveyed in the meeting.

71. Gang (Luke) Du, Yi (Jenny) Ding, Li Qian, and Eddy Mariotti subsequently received copies of the following documents from the Ministry of Labour:

- a letter dated February 11, 2003, and addressed to an official at the Canada Customs and Revenue Agency. The letter is on SLMsoft.com letterhead, and is signed by Khurram Qureshi, CFO. Amongst other information, Mr. Qureshi provides a list of directors of the corporation, and that list includes "Dr. B. Doobay";

- a letter dated May 22, 2003, on SLMsoft.com letterhead addressed to Mr. Govin Misir, CEO, President; Dr. Doobay, Director; Mr. Justin Mariani, Director; and Mr. Eddie Law, Director. Jerry Wiseblott, C.L.U. – KRG Insurance Brokers Inc. is copied on the letter.

- The letter is again from Khurram Qureshi, CFO, and includes advice that Insight Venture Associates LLC has filed a petition in bankruptcy for which the company is seeking a stay. It also indicates SLMsoft.com has initiated an application for protection under the CCAA (Company's Creditors Arrangement Act). The letter goes on to state that SLM Directors and Officers ("D&O") insurance will protect them from any creditor claims.

- a letter dated July 24, 2003, on SLMsoft [sic] letterhead, addressed to:

  Dr. B. Doobay
  Director, SLMsoft Inc.
  304 Victoria Ave. N.,
  Hamilton, ON L8L 5G4

  - the letter is from Natasha Bharratt, Assistant Secretary, Board of Directors, and advises that under a Judicial Order granted May 27, 2003, no action may be commenced or continued against any of the former, current or future directors of SLMsoft Inc. ("SLM") with respect to any claims that arose before the date of the Order, and that relate to any obligations of SLM where directors are alleged under any law to be liable in their capacity as directors for payment or performance of such obligations until a compromise or arrangement in respect of SLM, if one is filed, is sanctioned by the court and refused by Creditors:

[Note: there was no suggestion that SLMsoft Inc., SLM soft.com, and SLMsoft were not the same company.]

- unsigned "Minutes" of a meeting of the Board of Directors of SLMsoft Inc. held on October 29, 2003.

  - The minutes show "B. Doobay" attended by telephone.

72. Gang (Luke) Du, Yi (Jenny) Ding, Li Qian, and Eddy Mariotti testified that their receipt of these documents subsequent to their signing of the Settlement, led them to believe they were misled, and that Dr. Doobay remained a director at the critical time. They submit that the letter of resignation they were shown and relied on was false.

73. Mr. Mariotti testified that Dr. Doobay's continuing status as a director was consistent with his having occasionally seen Dr. Doobay on the premises of SLMsoft Inc. Mr. Mariotti further testified that usually when someone left SLMsoft Inc., a notice was circulated, and this had not happened with regard to Dr. Doobay. He also submitted that although SLMsoft Inc. was a publicly traded company, he was unaware of any filings indicating Dr. Doobay's removal as a director.

Applicants

74. Mr. Steinberg was the only witness who testified on behalf of the applicants, none of whom attended the hearing regarding the allegation of fraud. Mr. Steinberg could not recall where he first saw the copy of the December 1, 2002 "resignation letter", and testified it may have been provided to him by Dr. Doobay, or he may have first seen it in the possession of the

Ministry. While he indicated he had no specific recollection of the letter, or whether he ever saw the original, Mr. Steinberg testified that Dr. Doobay referred to a letter when discussing his resignation, which Mr. Steinberg now understands was the letter of December 1, 2002.

75. In cross-examination, Mr. Steinberg testified that he did not recall the two volume documents brief, containing some 40 documents, filed by the Ministry in this matter. Nor did he recall that Dr. Doobay's application, a copy of which was contained in the document brief, was late.

76. The application, completed by Dr. Doobay's prior counsel, with a law firm other than Mr.Steinberg's, requested an extension of time to file his application for review. The basis for the request was that "Dr. Budhendranath Doobay, **a director of SLMsoft Inc.**, never received a copy of the Order". The application also states that "Since the issues of the Application for Review are **identical** to the ones put forward by Mr. Govin Misir, there is no prejudice to the Ministry of Labour and no additional delay will result from granting the extension". [emphasis added] Mr. Steinberg conceded that Mr. Misir's application raised no issue regarding his status as a director.

77. Mr. Steinberg's attention was also directed to the Ministry of Consumer and Business Services Corporation Profile Reports for SLMsoft Inc. contained in the Ministry's document brief. The Corporation Profile Report, dated April 25, 2003, lists Dr. Doobay as an "Administrator", beginning June 14, 2002. The Corporation Profile Report, dated June 1, 2005, lists Dr. Doobay as a Director, with the same start date of June 14, 2002. Similarly, the Corporate Profile Report, dated January 21, 2006, lists Dr. Doobay as a Director, with the same start date of June 14, 2002.

78. Mr. Steinberg, whose practice includes commercial litigation, conceded there is a duty on corporations to file a notice of a corporate director stepping down with the Ministry of Consumer and Business Services.

79. Mr. Steinberg was also questioned about a note in the Ministry correspondence file, dated June 1, 2005. The note was made by Stephen Mason who previously had carriage of the file for the Ministry. It stated: "Telephone Call - David Steinberg, - D. Doobay resigned Dec '02. - looking for documents to verify, - (letter to Misir)". Mr. Steinberg testified he had no recollection of that conversation but admitted that it was possible it occurred.

80. Subsequent to June 2, 2005, the date of the Settlement, Dr. Doobay brought a motion, scheduled to be heard on May 25 and 26, 2006, challenging his status as a director. Mr. Steinberg conceded that after the Ministry filed its document brief, containing the documents referred to earlier, Dr. Doobay instructed him to abandon the motion.

81. Mr. Steinberg maintained that when he advised the signatories that Mr. Misir was judgement proof and that Mr. Doobay had resigned as a director prior to the critical time, he was just "the messenger" and was acting on instructions from his clients.

Submissions on behalf of the Ministry (Concurred with by the Signatories):

82. The Ministry argued that the Settlement Agreement should be voided pursuant to section 120(5) of the *Employment Standards Act*. That provision provides as follows:

> **120.** (5) If, upon application to the Board, the employee demonstrates that he or she entered into the settlement as a result of fraud or coercion,
>
> (a) the settlement is void;
>
> (b) if the review concerned an order, the order is reinstated; and
>
> (c) the review shall be resumed.

83. The Ministry submitted that fraud requires an intent to defraud as opposed to an honest or unintentional mistake (*J & Z Holdings Inc.*, [2005] O.E.S.A.D. No. 644 (June 29, 2005) at paragraphs 20 – 21; *Flowers By Dozen Inc.*, [2005] O.E.S.A.D. No. 86 (January 20, 2005) at paragraph 16. It relied on the following definition of fraud found in the judgment of Buckley, J., in *London and Globe Finance Ltd. (Re)*, [1903] 1 Ch. 728 at pp. 732-733:

> "To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely, it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

84. The Ministry submitted that the uncontroverted evidence before me proves that Dr. Doobay had not resigned as a director of SLMsoft Inc., but that the signatories were fraudulently deceived into believing he had done so prior to the time when the liability for unpaid wages accrued. The Ministry further submitted that the evidence also demonstrated that this deceit was pivotal to the signatories' decision to sign the Settlement Agreement.

85. The Ministry relied on the following documents to argue that the signatories in this matter would have had a difficult time locating documents attesting to the fact that Dr. Doobay had or had not resigned as a Director:

- November 6, 2003 letter to counsel for Schwartz Levitsky Feldman, CCAA Monitor of the SLMSoft companies from Aubrey Kauffman, Goodman and Carr, on behalf of Richters [Interim Receiver) referencing approximately 480 pounds of paper shredded on SLM premises on October 28, 2003 and assets being removed on October 30 and October 31, 2003;
- First Report to Court by Richters, dated November 4, 2003 re: SLMsoft and the *Bankruptcy and Insolvency Act*. Paragraphs 14 - 15 attesting to the fact that the Receivers had difficulty gaining access to the SLMsoft premises on October 31, 2003, and that upon entry, observed office drawers and cabinets open and empty, computers missing hard drives, and marks on the carpet consistent with marks that would be left after removal of a filing cabinet or shelving unit. Paragraph 29 attests to the fact that the Interim Receiver was advised of files having been removed from the premises over several weeks and provides a long list of assets that were missing;

- Letter from RSM Richter to Alexandra Bednar (Ministry counsel). dated March 29. 2006. attesting to the fact that not even the Receiver had possession of the SLMSoft Inc. minute books as a result of numerous books and records having been removed from the Company's premises.

86. The Ministry also pointed out that no applicants testified at the hearing. and submitted it is open to me to draw an adverse inference from their failure to call any evidence with respect to the letter of resignation. (See: *R. v. C.R.S.* (C.R.)(1998). 133C.C.C. (3d) 559 (N.S.C.A.) at 571: *R. v. Marshall* [2005] O.J. No. 3549 (Ont. C.A.) at paragraph 44: *Walbar Canada and U.S.W.A.. Loc. 9236 (Trinh) (Re)* 68 L.A.C. (4th) 149 at 8: *Madawaska Valley Assn. for Community Living and O.P.S.E.U.. Loc. 473 (Re) 68 L.A.C.* (4th) 289 at 9: *Canada Post Corp. and C.U.P.W.(Seymour).(Re)* 25 L.A.C. (4th) 137: *Bulk Systems (Ontario) Ltd. v. United Steelworkers of America (Goodman Grievance)* [2005] O.L.A.A. No. 82 at paragraph 137: *AFG Industries Ltd. v. United Steelworkers of America. Local 295G (Aluminum. Brick and Glass Workers Union) (Robichaud Grievance)* [1998] O.L.A.A. No. 844 at paragraph 59: *Versa Services Ltd. [1995]* O.L.R.B. Rep. January 79 at paragraph 29: *Sobeys Inc.* [1996] O.L.R.D. No. 3565 (October 7. 1996) Board File No. 2910-95-U at paragraphs 59 – 65.)

87. The Ministry also relied on the following legislative provisions as proof that the directors of SLMsoft Inc. should have been in a position to provide documented proof to the Board that Dr. Doobay had resigned. if there were any truth to that assertion.

(i) Section 299.(1) of the *Corporations Act*. R.S.O. 1990. c. C.38. as amended. requires a corporation to keep minutes of Board of Directors meetings;

(ii) Section 139. 140. 144. and 145 of the *Business Corporations Act*. R.S.O. 1990. c. B. 16 set out the record keeping obligations of a corporation. including the requirement to maintain a register of directors setting out the names and residence addresses. while directors. including the street and number. if any. of all persons who are or have been directors of the corporation with the several dates on which each became or ceased to be a director;

(iii) The *Corporations Information Act*. R.S.O. 1990. c. C. 39. and section 1a. (1) of regulations made pursuant to the *Corporations Information Act*. R.R.O. 1990. Reg. 182. as amended. which applies to corporate filings with the Ministry of Consumer and Business Services and requires that corporations file an initial return with the Minister. containing. *inter alia*. the names and addresses for service of the corporation's directors.... as well as the date on which each director became a director and. where applicable. the date on which a director ceased to be a director: and requires that changes to that information be filed within 15 days after the change takes place.

Submissions on behalf of the Applicants:

88. In their response. the applicants maintained that the signatories had believed that both Mr. Misir and Mr. Law were. effectively. judgment-proof. and that they could only expect to collect the wages owed to them from Dr. Doobay. Having been told that Dr. Doobay claimed to

have resigned as a director, and had no liability for the wages owed to them, the signatories, concerned that they may otherwise receive nothing, entered into the Settlement.

89. In the absence of any evidence to that effect, the applicants also argued that Dr. Doobay gave his purported letter of resignation to Mr. Misir. They point to section 121 of the *Ontario Business Corporations Act*, which provides that the effect of a director delivering a letter of resignation to a corporation is that the director resigns.

90. The applicants take issue with the signatories' submission that the documents upon which they rely, referred to above, prove that Dr. Doobay continued to be a director after the purported resignation letter was delivered to SLMsoft Inc. Rather, they argue that, at best, the documents demonstrate that *someone* at SLMsoft Inc. may have thought Dr. Doobay was a director at the relevant times, but that this is an insufficient basis for a determination that he remained a director. They submit:

> (a) The CRA letter was written on February 11, 2003, shortly after the Resignation Letter was delivered and that SLMsoft Inc.'s internal records may not have been updated yet.
>
> (b) The Insurance and Liability Letters are addressed to the individuals who would be *facing liability* as director; Dr. Doobay was clearly in that group, even if by the time the letters were written, he was no longer a director. [emphasis in original]
>
> (c) The Minutes are not signed. There is no evidence that these are minutes of a meeting of the board of directors of SLMSoft Inc. or that they are correct.

91. The applicants submit no adverse inference is to be drawn from Dr. Doobay's failure to respond to the above documents. They ask rhetorically, what Dr. Doobay's evidence could have been, other than to "repeat the position he has already taken in this litigation; namely that he had resigned as a director at the time of the delivery of the Resignation Letter", and that "these documents were wrong ..."

92. The applicants also argue that they had no prior notice that the employees would rely on some of the documents referred to in the hearing, and consequently had no opportunity to lead evidence to refute them.

93. Further, in the face of what was clearly the applicants' choice not to lead any evidence on the issue, they now argue that I should accept what they characterize as "a reasonable explanation for them, consistent with his not being a director". In that regard, the applicants maintain that none of the documents relied on by the signatories is inconsistent with Dr. Doobay having resigned in 2002.

94. Specifically, although the Corporation Profile Report continued to show Dr. Doobay as a director well into 2005, despite the statutory requirement on SLMsoft Inc. to correct the profile report, the applicants submit that corporations routinely neglect their reporting obligations to the Ministry. Having failed to submit any evidence this was the case with SLMsoft Inc., they further argue that the Corporation Profile Report is that evidence, and that the Corporation Profile

Report, rather than being proof that Dr. Doobay remained a director, is proof that SLMsoft Inc. failed to correct its filings.

95. With regard to Dr. Doobay's failure to mention that he was not a director at the time he requested an extension of time to appeal the Order to Pay, the applicants point out that in addition to setting out the grounds for his appeal, Dr. Doobay was also requesting an extension to the time limit for appeal. Consequently, they argue that "it was important, in that context, to align Dr. Doobay's appeal with that of Misir, to ensure that such leave would be granted" and this was not the time to raise an independent substantive defense.

96. In other words, rather than raise a critical substantive issue, Dr. Doobay chose to deliberately mislead the Board with regard to the nature of his appeal in order to secure an extension to the timeline for filing – even though there appears to have been no issue that he had not received timely notice of the Order against him, which would have been a sufficient basis for an extension.

97. The applicants also submit that Dr. Doobay is held out as a director on the first page of the application simply because it was in that capacity he had been found to be liable for the claimants' wages.

98. The applicants also take issue with the signatories' submission that I should conclude that Dr. Doobay no longer relies on the argument that he was not a director at the relevant time, because his motion was withdrawn. Rather, they argue that the motion was withdrawn because the issue of whether or not Dr. Doobay was a director was no longer relevant in the face of the Settlement.

99. The applicants argue that for a finding of fraud to be made there must be strict evidence of a misstatement of some fact which is material to the making or inducement of the contract. They point out that because of the seriousness of an allegation of fraud the evidence must be scrutinized with greater than usual care. (*Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164. They maintain that to establish a case of false misrepresentation, the following must be established:

> 1. Must be made to the innocent party; [presumably the false misrepresentation]
> 2. Were in fact false;
> 3. The Defendant knew them to be false;
> 4. The victim was thereby induced to enter into the contract.
>
> (*Milton v. D' Souza*, 2006 Carswell Ont 2731(SCJ), pars. 17-18; *George v. 1008810 Ontario Ltd.*, 2004 Carswell Ont 5811 (OLRH), pars. 28, 33)

100. The applicants submit that neither they nor their counsel ever said that Dr. Doobay was not a director. Rather, they submit that Dr. Doobay instructed Mr. Steinberg to tell the signatories that he had resigned as a director, and that if the matter went forward, Dr. Doobay would argue that the ***effect*** of his having resigned was that he was no longer a director. They submit that the signatories' conclusion from that information was a legal conclusion – i.e. that Dr. Doobay was not a director. They also suggest, again in the absence of any evidentiary

foundation, that the LRO may have mischaracterized the effect of the letter of resignation by telling the signatories that it meant that Dr. Doobay had resigned.

101. The applicants maintain the issue of Dr. Doobay's actual status as a director cannot be determined on the basis of the scant record which is now before me, and that "no one knows, as a matter of law, whether Dr. Doobay was a director of SLMsoft Inc. after 2002". Finally, they submit that Dr. Doobay, could not have said anything to knowingly mislead the signatories because he believed that he had resigned. Once again, there is no evidence before me to support that assertion.

102. The applicants also argue that, in any event, the issue of whether Dr. Doobay remained a director at the critical time is not before me.

103. The applicants acknowledged that the signatories who testified maintained they entered into the Settlement because they learned of Dr. Doobay's resignation. However, they pointed out that the signatories indicated that by this time, they generally did not trust anything told to them by the applicants, but determined they did not have any evidence to refute the resignation letter. Consequently, they were afraid to risk receiving nothing if they did not enter into the Settlement.

104. The applicants maintain no fraud had occurred. Rather, they submitted that the signatories were simply unhappy with the Settlement Agreement, and regretted entering in to it because they have not yet been paid. However, they submit that failure to pay is not fraud, and it is not grounds to set aside the Settlement Agreement. (*George v. 1008810 Ontario Ltd.*, 2004 CanLII 33763 (ON L.R.B.), para 34).

Ministry Reply Submissions:

105. In the Ministry's reply submission, the Ministry points out there is no evidence as to whether Dr. Doobay's letter of resignation was delivered to Mr. Misir at any time. Rather, the Ministry points out that the documents relied on by the signatories suggest it was not, as Mr. Qureshi, the Chief Financial Officer, and the Secretary to the Board of Directors, Natasha Bharratt, continued to correspond with Dr. Doobay in his capacity as director. The Ministry points out that it is unlikely these individuals would be mistaken about such a critical matter.

106. The Ministry also submitted that had Dr. Doobay testified, he might have been able to respond to the documents relied on by the signatories. For example, he could have indicated whether he participated as a director in the Board Meeting in October 2003, or whether the minutes were incorrect.

107. The Ministry also takes issue with the applicants' submission that they had no prior notice that the employees would rely on some of the documents referred to in their testimony. The Ministry maintains this is factually incorrect, and submits the applicants had prior notice of all of the documents referred to at the hearing. The Ministry points out they were provided to the applicants and the Board prior to the hearing scheduled in May 2006, for the purpose of determining whether Dr. Doobay was a Director of SLMsoft Inc.

108. In particular, the Ministry points out that the applicants also had prior knowledge of the Corporation Profile Reports, as they had been disclosed prior to the May 2006 hearing. Further, the Ministry maintains the applicants themselves would have provided the information contained in these reports, as they were required to do pursuant to the *Corporations Information Act*.

109. Consequently, the Ministry argues that Dr. Doobay had every opportunity to refute the many pieces of evidence leading inexorably to the conclusion that he was a director at the relevant time.

110. The Ministry also submitted that Corporation Profile Reports are admissible for the truth of their contents in the absence of evidence to the contrary, and maintained the applicants cannot ask me to rely on their submission that "corporations routinely neglect their reporting obligations to the Ministry " without calling some evidence that that is the case. Further, the Ministry also points out that no evidence was lead that SLMsoft Inc. had neglected its reporting requirements or was in the habit of so doing.

111. The Ministry also takes issue with the applicants' submission that because Dr. Doobay's application for review late, it was important to align Dr. Doobay's appeal with that of Mr. Misir, to ensure that such leave would be granted, and that consequently that was not the time to raise an independent substantive defence.

112. The Ministry submits that this suggests that Mr. F, Dr. Doobay's counsel at the time, would have deliberately misled this tribunal in January 2004, in order to obtain an extension of the limitation date for the filing of an appeal. The Ministry submits it would be unfair to Mr. F to place any reliance on this submission as it suggests that that Mr. F, who was not afforded the opportunity to testify, would misrepresent the truth and deliberately mislead a tribunal in order to obtain an advantage for his client. The Ministry points out that it could not call Mr. F to refute this suggestion, as he would be governed by solicitor-client privilege. However, the Ministry also points out that privilege is the client's privilege to waive. Therefore, Dr. Doobay could have waived the privilege and called Mr. F to testify.

113. The Ministry also argues, as indicated earlier, that had it been submitted, in January 2004, that Dr. Doobay should have been excluded from the Order because he was not a director at the relevant time, this would have almost guarantee an extension of the time to file an appeal.

114. The Ministry points out that counsel for the applicants still cannot explain the 1½ year lapse of time (January 2004 to June 2005) between the original application appealing the Order to Pay, and the new argument brought forward that Dr. Doobay was not a director.

115. The Ministry also takes issue with the applicants' submission that the motion regarding Dr. Doobay's status as a director was withdrawn because the issue was no longer relevant in the face of the Settlement. The Ministry maintains this is a distortion of what actually has occurred. The Ministry submits that after no payments were made pursuant to the Settlement Agreement, counsel for the Director of Employment Standards at the time, Mr. Stephen Mason, wrote to the Board on September 13, 2005 to advise that to be the case, and to request that the matter be brought back before the Board for a hearing. The Ministry points out that this letter is part of the record of this matter.

116. Subsequently, Mr. Steinberg advised the Board that one of the issues he was going to raise at the new hearing of the matter was that Dr. Doobay was not a director. For that reason, the Board scheduled two days of hearing (May 25 and May 26, 2006) to determine this "threshold issue". The Ministry points out that it was only after it disclosed to both the Board and counsel for the applicants, the documents upon which the Ministry would rely, that Mr. Steinberg advised he was no longer relying on the argument that Dr. Doobay had resigned as a director. The Ministry points out that these facts are also part of the record of this matter. The Ministry points out that in my decision dated May 25, 2006, I held:

> Motions related to the status of Dr. Doobay, as a Director, were set down for hearing on May 25 and May 26, 2006. Counsel for the three directors advised the Board by correspondence dated May 17 and 23, 2006 that these motions were not proceeding.

117. Consequently, the Ministry argues that it is untrue that the applicants had "previously" brought a submission before the Board for a determination that Dr. Doobay was not a director which was withdrawn in the face of the Settlement Agreement. Rather, the Ministry points out that this issue was raised for the first time in the settlement discussions with the signatories, described above.

118. The Ministry submits the test for fraud, has been met. It points out that the employees were told that Dr. Doobay was no longer a director, and this was untrue. The Minstry further submits that, as Dr. Doobay was a director at the relevant time, he therefore must have intended to deceive the employees if he instructed his lawyer tell the signatories that he had resigned. The Ministry also submitted that the signatories agreed to the settlement because they were told that Dr. Doobay had resigned as a director.

119. The Ministry also argued that: a) telling the signatories that Dr. Doobay had resigned, b) producing a letter of resignation as proof, and c) telling the signatories that should the matter go to hearing the applicants would take the position that Dr. Doobay was not a director, does not equate with telling the employees that there was a 'risk' that it would later be determined that Dr. Doobay had not been a director, as was submitted by the applicants.

120. According to the Ministry, the signatories relied on the letter produced by Dr. Doobay's counsel, Mr. Steinberg, as proof that Dr. Doobay had actually resigned. They were told by Mr. Steinberg that Dr. Doobay had resigned. As one of the employees testified, it did not occur to her that the letter was a "fake" letter. Finally, the Ministry submitted that Dr. Doobay could not have been uncertain of his status.

121. The Ministry submitted that I should make my decision on the basis of the evidence before me rather than on conjecture, speculation and inferences that are unsupported by any evidence.

Analysis:

122. The Ministry and the signatories point to Dr. Doobay's purported letter of resignation as a fraudulent representation, which induced them to enter into a contract against their own interests.

123. With regard to this issue, I accept the Ministry's arguments in their entirety.

124. As set out in *Milton v. D'Souza*, 2006 WL 1217354 (Ont. S.C.J.), 2006 Carswell Ont. 2731, at paragraphs 17 and 18, to establish a case of false misrepresentation, the following must be established:

> 1. the representation must be made to the innocent party;
> 2. the representation was in fact false;
> 3. the defendant knew the representation to be false;
> 4. The victim was thereby induced to enter into the contract.

125. In this instance, there is no allegation the signatories are anything other than "innocent" parties.

126. Further, other than Dr. Doobay's purported letter of resignation, there is no evidence before me that Dr. Doobay did, in fact, resign his position as director at any time before liability for the wages in these applications arose. Other than being addressed to "Dear Govin" the letter contains no address, and there is no evidence, *viva voce* or documentary, that it was ever delivered, or received.

127. I reject the applicants' submission that no adverse inference is to be drawn from Dr. Doobay's failure to respond to the documents relied on by the signatories, set out above in paragraph 71. Dr. Doobay has withdrawn his motion for a determination that he not a director. Without any evidence to contradict the documents relied on by the signatories, they constitute the best evidence before me, and make it difficult to conclude other than that Dr. Doobay remained a director at the critical time.

128. I also reject the applicants' indication that they had no prior notice that the employees would rely on some of the documents referred to in the hearing, and consequently had no opportunity to lead evidence to refute them. As pointed out by the Ministry, the applicants had prior notice of all of the documents referred to at the hearing, as they were provided to them and the Board prior to the hearing scheduled in May 2006, for the purpose of determining whether Dr. Doobay was a Director of SLMsoft Inc. The applicants were also provided with "will say" statements for the witnesses who testified on the issue of fraud, and were fully aware that Dr. Doobay's purported resignation would be challenged.

129. Finally, even if they were caught by surprise by the evidence, and I make no such finding, it was incumbent on them, through their counsel, to request time to prepare a response. No such concern was raised. Neither Dr. Doobay, nor the other two applicants attended the hearing to deal with the allegations of fraud. That was their choice.

130. The applicants also argue that it would be perverse for me to find that Dr. Doobay remained a director simply because his motion that he was not a director was withdrawn. Rather, they argue that the motion was withdrawn because the issue of whether or not Dr. Doobay was a director was no longer relevant in the face of the Settlement.

131. Well, that is how the law works. The employment standards officer made a determination that Dr. Doobay was a director. He no longer challenges that designation. Consequently, there is no conclusion to be reached, in law, other than that he remains a director.

I also note that the applicants make no comment regarding why Dr. Doobay's status is no longer relevant in light of the remaining claimants, who have not entered into the Settlement Agreement, and are still seeking enforcement of the Orders against all three applicants.

132. For all the reasons submitted by the Ministry, and set out above, I find that the representation that Dr. Doobay had resigned as a director by the time liability for the wages of the claimants was incurred was false, and that Dr. Doobay was aware that it was false.

133. The testimony of Gang (Luke) Du, Yi (Jenny) Ding, Li Qian, and Eddy Mariotti persuades me that the letter purporting to remove Dr. Doobay as a director of SLMsoft Inc. prior to when the liability for the claimants' wages arose, was a significant factor in inducing the signatories to enter into the settlement.

134. I find on the evidence that each component of the test set out in *Milton v. D'Souza* has been established. Consequently, I find that the evidence strongly supports a finding that the signatories entered into the Settlement Agreement as a result of fraud.

135. Therefore, I find that pursuant to section 120(5) of the Act, the signatories are entitled to an order voiding the Settlement Agreement on the basis of fraud.

DISPOSITION:

136. The Board voids the Settlement Agreement and directs the Registrar to set all three applications down for hearing on the merits regarding the claims of all the claimants, including those of the signatories to the Settlement Agreement.

3961-06-M; 0028-07-M Sun Parlour Emergency Services Incorporated (Essex Division), Applicant v. **Service Employees' International Union, Local 1.on**, Responding Party; Service Employees' International Union, Local 1.on, Applicant v. **Sun Parlour Emergency Services Incorporated (Essex Division),** Responding Party.

***Ambulance Services Collective Bargaining Act, 2001* – Essential Services Agreement – Interest Arbitration – Lock-Out – Strike – The union and the employer entered into an essential service agreement pursuant to the *ASCBA* where the number of employees who must work during a strike or lock-out were the exact same number that would be employed in the normal course – The employer's application asked the Board to find that "no meaningful lock-out can occur" in the circumstances and to direct binding arbitration to settle the collective agreement, while the union's application asked the Board to find that the employer had breached the essential services agreement – The Board found that for a lock-out (or strike) to be "meaningful" it must permit "the application of economic sanctions in order to further and support the collective bargaining process" – Since no employees would be locked out as a result of the essential service agreement, the Board concluded that the essential service agreement between the parties effectively precludes the employer from engaging in a lock-out – Employer's application allowed; final and binding interest arbitration directed; union's application dismissed**

BEFORE: *Kevin Whitaker*, Chair.

APPEARANCES: *David Cowling, John Jacobs, Jr., Rick Baldwin, Adrienne Couto, David Jacobs, John Fast* and *Ed Jacobs* for the employer; *Kelvin Kucey, Andrea Wilkinson, Roger Renaud* and *Ian Nash* for the union.

DECISION OF THE BOARD: April 23, 2007

I

1. The employer operates an ambulance service in southwestern Ontario. The union represents a bargaining unit of ambulance workers, full time, part time and volunteers.

2. This matter consists of two applications under the *Ambulance Services Collective Bargaining Act, 2001*, S.O. 2001, c.10 (the "ASCBA"), one from each party. The ASCBA provides for an essential services scheme to operate in the event of a strike or lockout. The parties have entered into an Essential Services Agreement ("ESA") in accordance with their obligations under the ASCBA.

3. The employer in its application, asks the Board to find that no meaningful strike or lockout can occur in the circumstances and to direct binding arbitration to settle a collective agreement.

4. The union asks in its application that the Board declare the employer to have breached the provisions of the ESA.

5. The employer's application was filed with the Board on March 14, 2007. A lawful strike commenced on March 20, 2007. The union's application was filed with the Board on April 4, 2007. The parties have not met to bargain since the commencement of the strike. No dates are set to resume bargaining.

6. A consultation was held on April 18, 2007 to deal with both applications.

7. At the conclusion of the consultation on April 18, 2007, the Board provided the following oral ruling, effective immediately:

> Having reviewed and considered the material filed and the submissions of the parties at the consultation, the Board concludes that the Essential Services Agreement between the parties has the effect of depriving the employer of a meaningful right to lock out employees.
>
> The Board directs that all matters remaining in dispute in collective bargaining between the union and the employer with respect to the bargaining unit of ambulance workers, be referred to an arbitrator for final and binding interest arbitration.
>
> With this disposition of the employer's application in Board File No. 3961-06-M, there is no labour relations purpose to be satisfied in granting the

remedies sought by the union in Board File No. 0028-07-M. Accordingly, the union's application is dismissed.

The Board's reasons will follow.

II

8. The relevant facts are not in dispute.

9. The employer operates an ambulance service with various bases in the County of Essex in southwestern Ontario. The union represents a bargaining unit of ambulance workers (as that term is used in the ASCBA).

10. The bargaining unit consists of roughly 94 employees, part-time, full-time and volunteers.

11. The collective bargaining relationship is a mature one, dating back several decades. The parties in the past have resolved their collective bargaining disputes by agreement or interest arbitration and until this round of bargaining, did not strike or lock out.

12. The parties bargained for and concluded an ESA dated February 27, 2006:

> **ESSENTIAL AMBULANCE SERVICES AGREEMENT**
>
> In accordance with section 3 of the Ambulance Services Collective Bargaining Act ("ASCBA"), the Employer and the Union agree to the following Essential Ambulance Services Agreement ("ESA"):
>
> 1. The parties agree that this ESA describes the number of Paramedics represented by the Union, which is minimally required to provide ambulance services with Sun Parlor Emergency services Inc., Essex Division in the case of a strike or lockout.
>
> 2. Paramedics required to perform services under this ESA are those persons employed in the classifications of "Volunteer", "Primary Care Paramedic" and "Advanced Care Paramedic" with Sun Parlor Emergency Services Inc., Essex Division and who are represented by the Union.
>
> 3. The Paramedics who are required to perform all essential ambulance services and all other normal and customary duties of his and her position during a strike or lockout. Save and except the following:
>
>   - Code 1 calls
>   - Code 2 calls except oncology treatments and home to hospital oncology, air ambulance arrivals and departures that are Code 1 and 2's (excluding Pelee Island).
>   - Whenever possible, Code 8 will be to the nearest base location.

> 4. The Paramedics, who are required to perform services under this ESA, shall be scheduled as per the Master Rotation and current scheduling guidelines.
>
> 5. The Union shall take no steps to prohibit, limit or interfere with scheduling and provision of services contemplated by this ESA.
>
> 6. The number of Paramedics required to perform services under this ESA are as stated on the Master Rotation.
>
> 7. In the case of an unanticipated emergency, the Employer can increase the number of Paramedics required to work under this ESA by 10% a period not to exceed seventy-two (72) hours. Paramedics will be called in pursuant to this paragraph in accordance with paragraph 4 (rotation/seniority lists). In the case of an unanticipated disaster, the Employer may increase the number of Paramedics to meet the requirement of the disaster.
>
> 8. "Incidental Work" for the purpose of section 4(1) (c) (i) of the ASCBA and "work that is performed on or in connection with an ambulance to protect health and safety" for the purposes of section 4(1) (c) (ii) shall be any and all duties normally and customarily performed by employees in the classification described in the ESA as well as any other incidental work the Paramedics are capable of performing and that is required to ensure the delivery of ambulance services. Save and except living quarters housekeeping, waxing of vehicles, and training (not to include certificate/re-certification through Base Hospital Program).
>
> 9. In accordance with s. 15(2) of the ASCBA the terms and conditions of the Paramedics who perform services under this ESA shall be in accordance with those terms and conditions specified in the collective agreement between the parties. Where the terms and conditions of the collective agreement or any practice are inconsistent with this ESA (particularly, but in no way limited to, hours of work and scheduling) the provision of this ESA shall govern.

13. The ESA requires paramedics to work their normal shift hours, at normal complement, performing all primary and significant duties in the event of a strike or a lockout.

14. The Director of Labour Management Services provided the parties with a "No Board" report on March 2, 2007.

15. The union commenced a lawful strike on March 20, 2007.

16. During the strike, employees in the bargaining unit have continued to work the same number of shifts, the same hours and, with extremely few exceptions, have performed the same duties as worked, prior to the strike. Throughout the strike, employees in the bargaining unit have been paid and compensated as they were prior to the strike. To be clear, there has been no reduction of hours or different duties assigned during the strike.

17. The ESA precludes the employer from assigning certain types of limited duties during the strike. The union in its application alleges that the employer has assigned these proscribed duties inappropriately on nine occasions. Further, the union suggests that this pattern of unlawful assignment continues.

III

18. The ASCBA governs the conduct of strikes and lockouts in the ambulance sector. The scheme of the legislation obliges parties to bargain ESA's in advance of being able to strike or lock out.

19. An ESA is essentially a special form of collective agreement that applies to terms and conditions of employment during a strike or lockout.

20. The underlying purpose of the ASCBA is to enable some degree of free collective bargaining (including the right to strike or lockout), while at the same time ensuring the public interest in maintaining essential services. It is a difficult balancing act.

21. The employer's application is brought pursuant to section 18 of the ASCBA. Section 18(1) permits either party to an ESA to apply to the Board for a declaration that an ESA has the effect of depriving ambulance workers of a meaningful right to strike, or an employer the meaningful right to lock out.

22. The purpose behind section 18 is to permit the Board to intervene and assist the parties where the content of a particular ESA deprives the parties' access to the cornerstones of free collective bargaining – the threat of economic sanction through strike or lockout.

23. Section 18(1) is disjunctive, which means that an application made under this section may assert the deprivation of a meaningful right to strike ***or*** lock out. As the request is being brought by the employer, and with the employer's agreement, the Board will only deal in this case with the latter issue - whether the ESA has deprived the employer of a meaningful right to lock out. Section 18(1) provides:

> 18. (1) A party to an essential ambulance services agreement may apply to the Board for a declaration,
>
> (a) that the agreement has the effect of depriving employees in a bargaining unit that contains ambulance workers of a meaningful right to strike; or
>
> (b) that the agreement has the effect of depriving the employer of a meaningful right to lock employees out.

24. In considering an application under section 18(1), section 18(4) places considerable constraints on what the Board may or may not consider. Section 18(7) permits the government to make regulations prescribing additional factors for the Board to consider under section 18(4), but at this time, none have been prescribed.

> 19. (4) In deciding whether to make the declaration, the Board shall consider only whether, because of the number of persons identified in the agreement whose services the employer has used to enable the employer to provide the essential ambulance services, the employees are deprived of a meaningful right to strike or the employer is deprived of a meaningful right to lock the employees out.

25. Section 18(4) directs the Board to consider only whether the number of persons whose services can be used under the ESA, is the causal factor which leads to the deprivation of the meaningful right to strike or lock out.

26. The ESA in this case makes it very clear in paragraphs 4 and 6 that the numbers of employees who must work during a strike or lockout are the very same numbers of employees who would be employed in the normal course. In other words, the employer would be prohibited from locking out any employees from working the very same shifts, earning the very same compensation that they would obtain working in the normal course.

27. To the extent that it may be relevant (although it would appear that section 18(4) precludes this as a consideration), it can also be observed that the duties to be performed by employees during a strike or lockout are, in all important respects, identical to the duties performed in the normal course.

28. The narrow question in this case is this: can an employer engage in a meaningful lockout where no employees can be locked out, and all employees continue to work and earn compensation as if there was no lockout?

29. It is trite to say that what makes a lockout (or strike for that matter) "meaningful" is that it permits the application of economic sanction in order to further and support the collective bargaining process. A lockout is the withdrawal of the opportunity to work and earn wages to compel a union to agree to an employer's collective bargaining demands. Indeed, there is no other legitimate purpose for a lock out.

30. Conversely, a strike is a collective withdrawal of labour for the express purpose of exacting economic damage to an employer to compel the employer to agree to a union's collective bargaining demands.

31. In this case, it is undisputed that if the employer were to embark on a lockout, then no employees would be "locked out" as that term is understood. Employee duties might be marginally different but their hours, conditions of work and perhaps, most significantly – the size of their paycheques – remain the same as before the lockout.

32. The Board concludes in these circumstances that the ESA between the parties effectively precludes the employer from engaging in a lockout. This clearly "has the effect of depriving the employer of a meaningful right to lock out employees".

33. The Board has a broad remedial discretion under section 18(8). The direction the employer seeks – interest arbitration - is but one option.

> 18. (8) In making a decision under this section, the Board may,

(a) amend the essential ambulance services agreement;

(b) direct the parties to continue negotiations for a collective agreement;

(c) direct the parties to confer with a mediator who shall endeavour to effect a collective agreement;

(d) order that the bargaining unit be divided into two units, one consisting of employees who are ambulance workers and the other consisting of employees who are not ambulance workers, and that all matters remaining in dispute between the parties with respect to the ambulance workers be referred to an arbitrator for final and binding interest arbitration; or

(e) give any other directions the Board considers appropriate.

34. The union did not oppose the particular remedy sought by the employer in the event that the Board concluded that the employer was deprived of the meaningful right to lock out. In the circumstances, it is appropriate to grant the employer's request.

35. In the application in Board File No. 0028-07-M, the union alleges a number of employer breaches of the ESA with respect to the types of work assignments made. The union seeks a number of remedies in order to ensure the employer's ongoing and future compliance with the work assignment provisions of the ESA.

36. The purpose in granting the types of remedies sought by the union would be remedial and not punitive. Absent some other labour relations purpose, these remedies would only be of assistance if a strike or lockout were to continue, and are meaningful only in support of the essential services scheme.

37. As indicated earlier, these parties have a mature bargaining relationship and have been able to settle their collective agreements in the past, either by bargaining or by mediation/arbitration. There is no history of either side failing to comply with the ASCBA. As the Board has directed interest arbitration and the strike will not continue, no labour relations purpose would be served in granting the remedies sought by the union, even if its alleged facts were proven.

38. With the parties now headed into arbitration to obtain a collective agreement, a hearing into the employer's alleged breaches of the ESA may serve only to undermine that process. The parties' resources and energies at this point are better spent in the pursuit of compromise and agreement than litigation and fault finding.

IV

39. For these reasons, the employer's application in Board File No. 3961-06-M is allowed. To reiterate, the Board directs that all matters remaining in dispute in collective bargaining between the union and the employer with respect to the bargaining unit of ambulance workers, be referred to an arbitrator for final and binding interest arbitration.

40. The union's application in Board File No. 0028-07-M is dismissed.

COURT PROCEEDINGS

(3261-04-JD; 3504-04-JD) (Court File No. 06-DV-1209) International Union of Bricklayers and Allied Craft Workers, Local 7, Applicant v. Operative Plasterers, Cement Masons, Restoration Steeplejacks International Association of the United States and Canada, Union Local 598; Colonial Building Restoration; Labourers International Union of North America, Local 527; 921879 Ontario Limited; Masonry Industry Employers Council of Ontario; and Ontario Masonry Contractors Association, Respondents

Construction Industry – Judicial Review – Jurisdictional Dispute – The Bricklayers brought an application for judicial review of the Board's decision finding that the employer's assignment of stone masonry work on the Victoria Memorial Museum Building in Ottawa to the Plasterers was correct – All parties agreed that the standard of review was patent unreasonableness when the Board deals with jurisdictional disputes – The court found that the Board "conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful" and that there was a clear "line of reasoning leading to the conclusions reached" – Accordingly the decision was not patently unreasonable and the application was dismissed

(Board decision not reported)

Superior Court of Justice (Divisional Court), Leitch, R.S.J., Lane and Hambly, JJ., April 12, 2007.

LANE, J.:

REASONS FOR DECISION

[1] This is an application for judicial review of a decision of the Ontario Labour Relations Board dated December 19, 2005 and a Reconsideration Decision dated March 7, 2006, resolving a work jurisdiction dispute between construction trade unions as to which union's members ought to be assigned specific work on a particular project. In so doing, the Board was exercising its jurisdiction under section 99 of the *Labour Relations Act*, ("*Act*"), which vests in the Board the exclusive jurisdiction to determine complaints that work is being assigned by an employer to members of one union rather than another, contrary to the *Act* or to a collective bargaining agreement ("CBA").

[2] The contending unions are the applicant Bricklayers Union, Local 7, ("Bricklayers") with whom the respondent Labourers Union Local 527 ("Labourers") is allied, and the respondent Operative Plasterers, Local 598, ("Plasterers"). The work involved is the stone masonry work on the Victoria Memorial Museum Building in Ottawa.

[3] Construction industry CBAs typically require employers to assign work to the appropriate craft-based union with whom the employer has a collective bargaining relationship. Such CBAs typically also require the employer, when contracting work out to other employers, to protect the union members by contracting only with sub-contractors having CBAs with the same unions.

[4] In the present case, the Museum contracted with PCL Constructors Canada Inc. ("PCL") to perform the work. PCL has CBAs with the Bricklayers and the Labourers, relating to the type of work in question, but not with the Plasterers who also perform such work.

[5] PCL decided to subcontract the work and pre-qualified several subcontractors, including the respondent Colonial. Although PCL's bid documents required bidders to ensure that PCL's CBA obligations would be complied with, it awarded the subcontract to Colonial, which had a CBA with the Plasterers but not with either Bricklayers or Labourers. Colonial commenced work using its own employees, members of the Plasterers. The Bricklayers and the Labourers filed grievances against PCL for its breach of its CBA responsibilities to them. In response, the Plasterers filed a notice with the Board asking it to use its section 99 jurisdiction to confirm that the assignment of the work to members of the Plasterers was correct.

[6] PCL then put pressure on Colonial to change the work assignment. Colonial responded by further sub-contracting the work to R.J.W. Stonemasons, a division of the respondent 921879 ("RJW"), which was without a CBA at the time. As a condition of obtaining the work, RJW entered into voluntary recognition agreements with Bricklayers and Labourers. The work thus ended up being performed by members of those unions, completing the circle. Colonial, but not PCL, filed a further section 99 notice over the work on the basis that it should be assigned to Plasterers.

[7] The Board held a consultation regarding the two complaints before it and on December 19, 2005, it ordered that Colonial be regarded as the employer and assign the work to Plasterers in accordance with Colonial's CBA responsibilities to Plasterers. Labourers, supported by Bricklayers, filed an application to the Board for a reconsideration of the decision. On March 7, 2006, the Board dismissed the reconsideration request. Bricklayers now seeks judicial review of these decisions.

The Standard of Review

[8] The parties are in agreement that the standard of review of the Board dealing with its section 99 jurisdiction is patent unreasonableness. We agree with that position. The Board is protected by two strong privative clauses, sections 114(1) and 116 of the *Act*. The Board is widely recognized as possessing an expertise in labour matters not shared by the court and the Legislature has confided in the Board exclusive jurisdiction to regulate those matters. In particular, the jurisdiction under section 99 clearly lies at the heart of the mandate of the Board. It is also largely a fact-finding exercise and that aspect of its work is protected by the deference paid by this court to the primary finder of fact. We do not re-weigh evidence, but confine our factual review to whether the evidence existed on which the Board could found its decision. Finally, the actual problem is the essence of labour relations: the resolution of jurisdictional or work assignment disputes between trade unions.

[9] The content of the standard of patent unreasonableness was addressed by the Supreme Court in *Southam*[1] where the Court stated that if the defect is apparent on the face of the tribunal's reasons, the decision was patently unreasonable, but if it takes some significant searching to find the defect, then it is not patently unreasonable. This is obviously a very high standard of review, which has variously been described as "clearly irrational"[2] or as "so flawed that no amount of curial deference can justify letting it stand.[3]"

The Statute

[10] Section 99 comes into play when the Board receives a complaint that, inter alia, "an employer" is assigning work to persons in a particular trade union or in a particular trade or craft rather than to persons in another. As noted above, the obligation to employ members of a particular union for particular kinds of work is an important feature of construction CBAs. The Board has extensive powers, including the power to alter bargaining units and the power to "make any interim or final order it considers appropriate after consulting with the parties." (section 99(5)). This extraordinarily broad power is left entirely to the Board to administer. There are no statutory directions, guidelines or limitations directing the Board as to the factors to be considered or the weight to be given to those that are considered. The Board has developed a body of arbitral jurisprudence, but the Legislature has left the Board to exercise its discretion according to the infinitely variable facts as they arise.

The Board's Decisions

[11] As noted, the statute refers to "an employer" assigning work. Accordingly, the Board set out to determine who was the employer for the purposes of section 99. The Board considered each of PCL, Colonial or RJW. This was a matter of importance because the "consideration of the usual criteria" applied in section 99 cases "could lead to different conclusions depending on who the employer is."[4] Among the criteria developed by the Board in its jurisprudence are a consideration of the CBA connections of the employer and a consideration of the employer's past practices in the assignment of similar work. The identity of the employer is clearly central to these considerations. At paragraph 12, the Board noted that the dispute has arisen because PCL allegedly violated its CBA obligations by subcontracting to an employer with whom Bricklayers and Labourers have no CBA, and then complicated the situation by encouraging Colonial to violate its CBA by a further subcontract to RJW. It went on to consider the Board jurisprudence as to the effect of subcontracting: was a subcontract an assignment of work by the general contractor? Was the act of subcontracting devoid of labour relations consequences? It concluded that the involvement of both general contractor and subcontractors in the litigation of a jurisdictional dispute was important for the process.

[12] The Board next turned to the position of PCL, a matter on which the applicants in the present case say the Board acted in a patently unreasonable fashion. At paragraph 24, the Board stated that no one had made PCL a party, nor had PCL provided any materials or any explanation of its practice in the assignment of work. Further, the Board said:

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[1] Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1997] 1 S.C.R. 748 at paragraph 57.

[2] Canada (Attorney General) v. P.S.A.C. [1993] 1 S.C.R. 941, 963-4.

[3] Ryan v. Law Society (New Brunswick), (2003) 223 D.L.R. (4th) 577 (S.C.C.), paragraph 52.

[4] December reasons, paragraph 10.

> "I do not see how PCL could be made subject of a direction regarding an assignment in this case. Counsel for Labourers 527 insists that PCL can be made subject of a direction in this case as it has been given notice of these proceedings and has chosen not to participate. In support of this submission, he cites *Comstock Canada*[5] and *Ontario Hydro*[6]. Both of those cases are distinguishable as the employer that chose not to participate was named as a party to the proceeding. In the circumstances of this case it would not be appropriate [to] make a direction against PCL. Therefore, the practice and preference of PCL is less significant in the overall determination of this case."

[13] The Board then went on to consider Colonial and RJW and concluded that the practice of Colonial in assigning work to the competing unions was of greater significance than the practice of RJW, which had no union practice prior to the Museum job. The Board then made the important finding that the "criteria of employer practice favours the claim of [Plasterers]".

The "Party" Issue

[14] This finding, and in particular the alleged elimination of PCL from further consideration because it was not a party, was vigorously attacked before us by counsel for the applicant Bricklayers. The decision was patently unreasonable: fatally flawed by the clearly erroneous finding that PCL was not a party. This finding skewed the entire proceeding by wrongly eliminating the general contractor whose CBA ties were to the Bricklayers and Labourers. We were referred to the definition of "party" which includes anyone named in an application. The various applications and related documents all name PCL. Therefore the Board was in error.

[15] These arguments were made to the Board in the reconsideration application before being made to us. In the March 2, 2006 decision, the Board addressed the status of PCL, noting that PCL was not named as a "responding party", but as an "interested party" entitled to notice of the proceedings. No one had asked the Board to make PCL a responding party, nor did anyone assert any claim to relief against PCL. At paragraph 9, the Board said that an entity is generally named as a responding party when relief is being sought from it, and as an interested party when no relief is sought from it but it has some interest in the proceedings.

[16] An examination of the documents in which PCL was named discloses that there are different areas in the Board's forms for "responding parties" and "other" parties. PCL appears in the latter class. Thus, while the definition is broad, the practice seems, not surprisingly, to be as the Board describes it.

[17] Returning to the Board's March decision, at paragraph 10, the Board pointed out that, as no relief was claimed against PCL, fairness would prevent the grant of relief in the circumstances. In the reconsideration application, Labourers asked for an order that the Board order PCL to assign the disputed work to Bricklayers and Labourers. At paragraph 11, the Board points out that nowhere in the materials filed did anyone assert that PCL had made an assignment or that it should be directed to make an assignment of the work. Bricklayers and Labourers did not rely on any assignment of work by PCL: they asserted that the assignment by RJW to themselves ought to be confirmed. The Board concluded:

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[5] [1993] O.L.R.B. Rep. Aug 740.

[6] [1994] O.L.R.B. Rep. June 752.

> I can only assume that the parties crafted their pleadings carefully and deliberately and chose not to describe the contract from PCL to [Colonial] … as an assignment by PCL.

[18] In my view, the clarification of the position in the reconsideration order entirely answers the submission that the Board made an egregious error in dealing with the position of PCL. There was no error. It was entirely reasonable for the Board to conclude that PCL's practices should be given less weight in the circumstances. However, the Board did not, as submitted, entirely eliminate PCL from consideration. There may have been some infelicity of expression, but the Board was not acting irrationally or without any line of reasoning that could take it to its conclusion. The Board did not conclude, as counsel for Labourers submitted, that no order could be made against PCL simply because PCL had chosen not to participate actively. On the contrary, the Board felt that it could not in fairness have made any order when no one had made any allegation against PCL. It was not of a mind to make such an order in any event, because the circumstances did not make it appropriate to do so.

The "Local Area" Issue

[19] The applicant disagreed with the Board's consideration of the factor of the general practice of contractors in the local area in the assignment of work to one union or the other, arguing that the Board failed to assess the practice at various construction sites in the area (number 15 of the 32 areas into which Ontario is divided for this purpose). The applicant presented evidence of many projects where such work had been assigned to them, whereas the Plasterers advanced only a few. The Board acknowledged that by far the greater amount of such work was performed by the members of Bricklayers and Labourers, but, the applicant submitted, despite that fact, the Board patently unreasonably favored the Plasterers.

[20] The Board did consider this factor in its reasons, beginning at paragraph 26. It pointed out that most of the evidence relied on was related to "single trade contractors" that is, contractors with CBA ties to only one side of the two contending parties in this dispute. As it happened, most of the local contractors had such ties with Bricklayers and Labourers. However, the Board appears to have given consideration to the jurisprudence brought to its attention by Plasterers to the effect that the Board customarily gives little weight to work assignments made by contractors who are bound by CBAs with only one of the two competing unions. The Board considered other local area factors with care and, in the end, acknowledged that this factor may have favoured the applicant although the CBA obligations of Colonial favoured assignment to the Plasterers. This may not have been the clearest part of the decision, but it is clear that the Board considered the local practice and the predominant position of Bricklayers and Labourers in it, as well as the jurisprudence. One may disagree with the weight given to these matters in the conclusion about the local area factor, but the analysis cannot be described as irrational.

[21] This concludes the discussion of the matters that were pressed in argument. In my view, the Board conducted a thorough and careful review of the factors that Board jurisprudence has evolved as relevant and helpful. There is an evident line of reasoning leading to the conclusions reached. The decision reached was not patently unreasonable.

[22] For these reasons, I would dismiss the application.

0812-06-R (Court File No. 481/06) Maystar General Contractors Inc., Applicant v. The International Union of Painters and Allied Trades, Local Union 1819 and The OLRB, Respondents

Certification – Construction Industry – Judicial Review – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted

(Board decision not reported)

Superior Court of Justice (Divisional Court), Cunningham A.C.J.S.C., Lane and Smith JJ. March 20, 2007.

CUNNINGHAM A.C.J.S.C.:

Overview

[1] The applicant, Maystar General Contractors Inc. ("Maystar"), seeks judicial review of the June 19, 2006 Certification Decision and September 6, 2006 Reconsideration Decision of the respondent Ontario Labour Relations Board (the "Board"). The Board ordered the respondent International Union of Painters and Allied Trades, Local Union 1819 (the "Union") to be certified as the bargaining agent representing two "glaziers" allegedly employed by Maystar as of June 13, 2006 (the date of the certification application). The Board arrived at its decision without considering Maystar's response to the certification application because the response was delivered after the statutory two-day time limit and the Board concluded it did not have jurisdiction to consider late-filed information.

[2] For the reasons that follow, Maystar's application for judicial review is allowed.

Background

[3] On June 13, 2006, pursuant to s. 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A (the "LRA"), the Union sought certification for "all glaziers and glazier apprentices" employed by Maystar. Certification applications in the construction industry are card-based certifications. Where more than 55 percent of the employees in a proposed bargaining unit sign union membership cards, the Board may automatically certify the union without a representation vote (LRA, s. 128.1 (13)).

[4] The Union claimed that as of June 13, 2006, there were two employees in the proposed province-wide bargaining unit working at Maystar's Harmony Road job-site in Oshawa. On June 15, 2006, Maystar served the Union with its response. Through the inadvertence of the attending lawyer's assistant, Maystar did not fax the response to the Board.

[5] On June 19, 2006, the Board issued its Certification Decision, certifying the Union. Since Maystar's response was not faxed to the Board, the Certification Decision was made without considering the information in the response. On June 26, 2006, Maystar filed a Request for Reconsideration with the Board, asking it to reconsider its Certification Decision and consider the information in Maystar's response.

[6] In Maystar's response, it alleged that it did not employ any glaziers or glazier apprentices on June 13, 2006. According to Maystar, the only two glaziers at the Harmony Road job-site were contractors and were not "employees" of Maystar for the purposes of the LRA. Maystar admitted that it did have two labourers at the Harmony Road job-site that day. If those labourers were found to be "glaziers" or "glazier apprentices", Maystar submitted that it actually employed eight such employees over four job-sites on June 13, 2006. Therefore, it challenged the number of employees in the Union's proposed bargaining unit.

[7] On September 6, 2006, the Board issued its Reconsideration Decision. The Board held it would not consider the information in Maystar's response because it was filed after the two-day time limit prescribed by s. 128.1 (3) of the LRA. In coming to this conclusion, the Board adopted the analysis in *Air Kool Ltd.*, [2005] OLRD No. 3390 at paras. 15-29 [*Air Kool*]. In *Air Kool*, the Board concluded that the two-day time limit in s. 128.1 (3) was mandatory and that the Board was required by s. 128.1 (4) to consider only the information in the certification application and timely information from the employer when determining the description of, and number of union members in, the proposed bargaining unit.

Legislative Provisions

[8] The provisions of the LRA relevant to this application for judicial review are as follows:

> **Application for certification without a vote**
> **Election**
>
> **128.1** (1) A trade union applying for certification as bargaining agent of the employees of an employer may elect to have its application dealt with under this section rather than under section 8.
>
> **Notice to Board and employer**
>
> (2) The trade union shall give written notice of the election,
> (a) to the Board, on the date the trade union files the application; and
> (b) to the employer, on the date the trade union delivers a copy of the application to the employer.
>
> **Employer to provide information**
>
> (3) Within two days (excluding Saturdays, Sundays and holidays) after receiving notice under subsection (2), the employer shall provide the Board with,

(a) the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed; and

(b) if the employer gives the Board a written description of the bargaining unit that the employer proposes, in accordance with subsection 7 (14), the names of the employees in that proposed bargaining unit, as of the date the application is filed.

Matters to be determined

(4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),

(a) the bargaining unit; and

(b) the percentage of employees in the bargaining unit who are members of the trade union.

Exception: allegation of contravention, etc.

(5) Nothing in subsection (4) prevents the Board from considering evidence and submissions relating to any allegation that section 70, 72 or 76 has been contravened or that there has been fraud or misrepresentation, if the Board considers it appropriate to consider the evidence and submissions in making a decision under this section.

...

Board may certify or may direct representation vote

(13) If the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the date the application is filed, it may,

(a) certify the trade union as the bargaining agent of the employees in the bargaining unit; or

(b) direct that a representation vote be taken.

Legal Issues

[9] The following issues are relevant to this application for judicial review:

1. What is the appropriate standard of review?
2. Did the Board err in concluding that the word "shall" in s. 128.1 (3) of the LRA is mandatory and that the Board is therefore precluded from considering employer information that is submitted after the two-day time limit?

Standard of Review

[10] To determine the appropriate standard of review, the court must engage in the pragmatic and functional approach (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982 at paras. 29-38 [*Pushpanathan*] and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226 at 238).

[11] The pragmatic and functional approach requires consideration of four contextual factors: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and the nature of the question - law, fact or mixed law and fact.

[12] Maystar submits that the appropriate standard of review of the Board's decision is correctness. Maystar concedes that the Board's decisions are protected by broad privative clauses (ss. 114 and 116 of the LRA), but argues that other factors suggest less deference is owed to this particular decision of the Board. Maystar submits that the nature of the question before the Board is a question that concerns the limits of the Board's jurisdiction – namely, is the Board precluded from considering information provided to it beyond a time limit prescribed by the LRA? Maystar asserts that this question does not fall squarely within the Board's expertise to regulate and resolve particular labour disputes, but rather concerns the boundaries of its jurisdiction, which is a general question of law. Maystar also points out that the Board's ruling on this question is of precedential value.

[13] The Union submits that the appropriate standard of review is patent unreasonableness. It notes that the Board's decisions are protected by strong privative clauses and are not subject to appeal, and that the Board is recognized as an expert tribunal, particularly regarding certification applications. The Union says the LRA is intended to resolve and balance competing policy objectives or the interests of various constituencies. Finally, the Union submits that the nature of the question before the Board called for an informed interpretation by an expert tribunal of its home statute. Taken together, the Union submits that these factors suggest that the Board is entitled to the highest degree of deference.

[14] The Board also submits that the appropriate standard of review is patent unreasonableness. In addition to being protected by two strong privative clauses, the Board points out that the courts have acknowledged the Board's expertise on questions of interpretation of labour relations legislation. The purposes of the LRA are set out in s. 2, and include facilitating collective bargaining, recognizing the importance of workplace parties adapting to change, promoting flexibility, productivity and employee involvement in the workplace, encouraging co-operative resolution of workplace issues, and promoting the expeditious resolution of workplace disputes. The purpose of s. 128.1 of the LRA is to provide an expeditious alternative regime for the certification of unions in the construction industry. The Board submits that it must balance these sometimes-competing purposes and objectives when interpreting the LRA, which suggests that it is entitled to deference. While the Board admits that interpretation of s. 128.1 is a question of law, it submits that this question goes to the heart of the Board's expertise, which also points toward deference. Taken together, the Board submits that all of these factors indicate that the Board should receive the highest degree of deference.

[15] While the Supreme Court has said in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 at para. 68, that a correctness standard of review will rarely be applied in the context of labour adjudications, I find that the appropriate standard of review for this particular decision of the Board is correctness. I acknowledge that curial deference is suggested both by the presence of two privative clauses protecting the Board's decisions and by the fact that the Board must balance competing labour relations objectives when interpreting the LRA. Nevertheless, the pragmatic and functional

approach is not meant to be rigid and formulaic in its application. As stated by Laskin J.A. in *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology* (2006), 80 O.R. (3d) 1 at para. 32 (C.A.): "The purpose of the pragmatic and functional analysis -- of considering the four contextual factors -- is to ascertain the legislature's intent. See Dr. Q, supra, at para. 26. Did the legislature intend that a reviewing court give deference to the Board's decision, and if so, what level of deference?" While certain contextual factors may suggest curial deference is owed to a tribunal, other factors may, in the context, overwhelmingly indicate that the Legislature intended there be little or no deference given to the tribunal's decision.

[16] As will be outlined below, the foundation of the Board's analysis rests on its conclusion that the word "shall" in s. 128.1 (3) is mandatory and not directory. This is a question of law of precedential value, which suggests less deference is owed (*Pushpanathan, supra* at para. 43). Since relative expertise is the "most important factor" in the pragmatic and functional analysis, the key question for determining the appropriate standard of review in this particular case is whether the Board has greater relative expertise than the courts in interpreting the legal effect of the word "shall" in s. 128.1 (3) (*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 758 at para. 50; *Pushpanathan, supra* at para. 32-33). In my opinion, the Board's labour relations expertise does not give it a comparative advantage over the courts on this narrow legal question. Therefore, the Board's interpretation is not entitled to deference and will be reviewed on a standard of correctness.

Analysis

[17] In deciding to refuse to consider the employer's late-filed information, the Board relied extensively on the analysis in *Air Kool*, reproducing all of paras. 15-29 of that decision in its own reasons. This necessitates a detailed examination of the analysis contained in those paragraphs.

[18] In *Air Kool, supra* at paras. 15-29, the Board outlined its interpretive approach to s. 128.1 (3). Subsection 128.1 (3) states that the employer "shall" provide certain information to the Board within two days. The Board noted that the *Interpretation Act*, R.S.O. 1990, c. I.11 requires the word "shall" to be construed as imperative. While "shall" is always imperative, the context will determine whether the imperative is "mandatory" or "directory". The Board cited Ruth Sullivan, *Sullivan & Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 60, for the test used to determine whether "shall" is mandatory or directory: "...if breaching an obligation or requirement imposed by 'shall' entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory."

[19] The Board concluded that the word "shall" in s. 128.1 (3) is mandatory because there are statutory consequences for failing to do what s. 128.1 (3) says the employer "shall" do which the Board cannot fix or disregard.

[20] The first consequence identified by the Board was that s. 128.1 (4) requires the Board to only consider the information provided in the union's certification application if the employer fails to submit its information within the two-day time limit in s. 128.1 (3). The Board came to this conclusion by noting that s. 128.1 (4) says the Board "shall" determine the union's level of support based on the information provided by the union in the certification application and "the information provided...under subsection (3)". To be "information provided...under subsection

(3)", the employer must deliver the information within the two-day time limit. Since the Board has no statutory authority to extend a time limit in the LRA, the consequence of an employer failing to provide information within the two-day time limit is that the Board may not consider it.

[21] The second consequence identified by the Board was that a failure of the employer to provide information under s. 128.1 (3) may result in the Board finding that the union has more than 55 percent employee support and deciding that the union may be certified without a representation vote pursuant to s. 128.1 (13).

[22] The Board said that its interpretation was supported by s. 128.1 (5), which expressly allows the Board, in assessing the union's level of support under s. 128.1 (4), to consider allegations of unfair labour practices, fraud or misrepresentation. The Board noted that there is no express prohibition preventing the Board from considering such allegations, yet the Legislature felt it necessary to expressly permit the Board to consider such matters, which suggests that the Legislature intended s. 128.1 (4) to give the Board very little discretion to act.

[23] Finally, the Board said that its interpretation was also consistent with the statutory context, since the Legislature has drafted the provisions in the LRA dealing with the establishment of collective bargaining rights in a strongly prescriptive manner (i.e. the Legislature has chosen to "closely manage" the manner in which the Board conducts a certification application).

[24] It is also instructive to recite the Board's own comments on the analysis set out in the *Air Kool* decision. At para. 8, the Board said,

> In *Air Kool*...the Board has determined that the time limits in section 128.1(3) are mandatory and that the Board is obliged in section 128.1(4) to make its determination about [the union's level of support]...on the basis of only the information in the application and timely information from the responding party... [emphasis added]

[25] At para. 9, the Board rejected Maystar's submission that the time limits in s. 128.1 (3) are directory, saying,

> The responding party asserts that the time limits in section 128.1(3) are directory, largely because there are no direct consequences for non-compliance. The Board specifically addressed that argument in *Air Kool*. The Board concluded that section 128.1(4) sets out the consequences for failing to meet the time limits, that is, the Board will certify the application, a significant consequence. Further, section 128.1(5) bolsters the analysis that the time limits are mandatory by carving out the circumstances in which the Board may consider otherwise untimely information, that is, where there is fraud, misrepresentation, coercion, etc. that strikes at the heart of the reliability of the membership evidence provided by an applicant. [emphasis added]

[26] With respect, the Board has made two fundamental errors in concluding that the word "shall" in s. 128.1 (3) is mandatory. First, s. 128.1 (4) does not describe the consequences of failing to file information within the two-day time limit. Subsection 128.1 (4) simply directs the Board to determine the union's level of support as of the certification date, and instructs the Board as to the information upon which it is to make that determination. *Subsection 128.1 (4) does not direct the Board to* not *consider late-filed information*. This conclusion is consistent with the highly prescriptive nature of the certification provisions in the LRA as noted by the Board and emphasized by the Union in this application. Given that the Legislature's clear intent is to "closely manage the establishment of bargaining rights by certification", if the Legislature intended the Board to *always* refuse to consider late-filed information, it would have expressly said so.

[27] In addition, contrary to the Board's assertion at para. 9 of its decision, s. 128.1 (4) does not require the Board to certify the union if the employer does not file its information within the two-day time limit. The decision to certify the union without a representation vote is discretionary and requires evidence that more than 55 percent of employees in the proposed bargaining unit support the union (see s. 128.1 (13)).

[28] Second, the Board erred in stating, at para. 9 of its decision, that s. 128.1 (5) sets out the "circumstances in which the Board may consider otherwise untimely information." This provision does not in any way address the timeliness of information placed before the Board. It simply provides the Board with the discretion to consider allegations of unfair labour practices, fraud or misrepresentation when determining the union's level of support at the date of the certification application. As indicated in *Air Kool, supra* at para. 26, s. 128.1 (5) is demonstrative of the Legislature's intent to "closely manage" certification applications by clarifying that the Board has discretion to consider certain evidence (like evidence of fraud). But it does not necessarily follow that this provision demonstrates the Legislature's intent to *prohibit* the Board from considering late-filed information. Again, if the Legislature intended such a consequence, it would have expressly said so.

[29] In my view, the word "shall" in s. 128.1 (3) is directory. If an employer fails to deliver its information within the two-day time limit, the Board *may* remedy the breach in accordance with its Rules of Procedure (see *Easton's Group of Hotels Inc.*, [2006] O.L.R.D. No. 2940 at paras. 11-20).

Disposition

[30] For the reasons outlined above, the application for judicial review is allowed and the Board's September 6, 2006 Reconsideration Decision is set aside. The matter is remitted to the Board for reconsideration in light of these reasons for judgment.

[31] Any party wishing to make submissions as to costs may do so by way of brief written submissions to the Court within 30 days of the release of these reasons for judgment.

2049-03-U et al (Court File No. 559/06) Richard Weiss as Trustee for Local 183, Universal Workers Union, Labourers' International Union of North America, Applicant v. Ontario Labour Relations Board, Antonio Dionisio and John Dias, Respondents

Conflict of Interest – Judicial Review – Trusteeship – In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 – The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" – In the Court's view, all the information held by the law firm related to the trusteeship and its litigation – Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent – Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" – Application for judicial review allowed

(Board decision reported at [2006] OLRB Rep. November/December 848)

Superior Court of Justice (Divisional Court), Ferrier, Howden and Himel JJ. March 21, 2007.

HOWDEN J.:

[1] Local 183 applies by its Trustee for an order quashing the decision of the Ontario Labour Relations Board ("the Board") made pursuant to s. 149(4) of the *Labour Relations Act, 1995* S.O. 1995, c. 1, Schedule A ("the *Act*"). The Board ruled that Shell Lawyers is not in a conflict of interest and should not be removed as counsel for the respondents, Antonio Dionisio and John Dias, formerly members of the Executive Board of Local 183.

[2] Shell Lawyers had acted as counsel for Local 183 until it was placed in trusteeship by its parent union, the Labourers' International Union of North America ("LIUNA"). LIUNA represents construction workers across North America. Local 183 has approximately 27,000 members in Ontario. LIUNA and Local 183 have been locked in a bitter dispute since 2003, after the election of the Local's leadership group which included Dionisio and Dias. Between October, 2003 and June 12, 2006, a total of sixteen applications were filed with the Board by the parties to this dispute. The Board described the files before it as of June 12, 2006 in the following terms:

> (Local 183 alleges) that its parent Labourers' International Union of North America (hereinafter "LIUNA") had purported to place Local 183 into trusteeship without just cause, contrary to ss. 147(1) and 149(1) of the *Labour Relations Act, 1995* ... The other files consist of a series of applications and cross-applications relating to the series of

> events leading up to and following the ultimate decision by LIUNA to place Local 183 into trusteeship. (Board's Reasons for Decision, Jan. 26, 2007, Respondents' Record, p. 184)

[3] On June 12, 2006, following the hearing of evidence and submissions, the Board dismissed the application under s. 147, holding that trusteeship did not amount to an "alteration of jurisdiction" within the meaning of that section. The Board upheld the imposition of trusteeship on Local 183, finding there was just cause for that action by LIUNA. The Board described Local 183 as:

> a large multi-faceted construction local representing over 30,000 workers in virtually every aspect of the construction industry in Ontario. Naturally Local 183 took a very active role in these proceedings and it is a named applicant in most of the applications. It should be noted however that the necessary consequence of this litigation was to determine who would be in control of Local 183 in the immediate future – either the local leadership of Local 183, or its parent international union – LIUNA. Thus, the real protagonists of this litigation were the leadership of Local 183 on the one hand and LIUNA on the other. That is why certain individuals from the local leadership, such as Tony Dionisio and John Dias, have been named as parties in their own right and why they have continued to challenge this trusteeship well after the decision of June 12, 2006. (*Ibid*, p. 185)

[4] As part of its disposition of June 12, 2006, the Board ordered that all officers and staff of Local 183 were to take such action as necessary to transfer control and authority of the assets of Local 183 to the appointed trustees. The Board directed LIUNA to file a plan and timetable for lifting the trusteeship and to inform members of Local 183 of the details within one month. It also dealt with the delegates nominated to attend an upcoming LIUNA convention. The Board remained seized of all issues arising from the implementation of the June 12th decision and stated that it would make any further directions and/or remedial orders in the exercise of its powers under s. 149(4) of the *Act*.

[5] Subsections 149(1) and (4) of the *Act* are relevant. They read:

> 149(1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local union is affected.
>
> . . .
>
> (4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local union.

[6] Following the June 12th order, Local 183, through its Trustee, terminated the retainer of Shell Lawyers as its solicitors and counsel. Mr. Shell wrote to inquire whether Local 183 would object to Shell Lawyers acting for unnamed former employees of Local 183. Local 183

replied on July 19, 2006 that it expected compliance by Shell Lawyers with its professional obligations in light of Local 183's right to assert conflict of interest and solicitors' duties of loyalty and maintenance of solicitor-client privilege. It later objected to Shell Lawyers acting specifically for the respondents Dionisio and Dias.

[7] A number of subsidiary matters arose for the Board's direction throughout the summer of 2006. Mr. Shell acted as counsel for a group called the "Jurisdictional Committee" of Local 183 and the forty-eight nominated delegates to the LIUNA convention. The Board issued various orders on subjects relating to Local 183, the respondents and the Jurisdictional Committee, including a cease and desist order regarding surveillance by LIUNA complained of by Shell Lawyers; prohibition of further employment terminations by Local 183; a consultation without order regarding LIUNA's list of delegates from Local 183; rescission of the employee termination prohibition while retaining supervisory jurisdiction over claims about employee discipline or termination; and reconsideration of the Board's decision not to intervene in the LIUNA delegate issues and confirmation thereof. October 3, 2006 was the date set to consider submissions regarding how to deal with all remaining issues arising from the trusteeship order.

[8] On October 3, counsel for LIUNA and Local 183 objected that Shell Lawyers was in a conflict of interest by continuing to act for the Jurisdictional Committee and Messrs. Dionisio and Dias against the interests of Local 183. At that time, the Committee had three members; the third member indicated that he no longer wished to be represented by Shell Lawyers. LIUNA and Local 183 objected that the Committee had no standing and that Shell Lawyers was in a conflict of interest, having acted formerly for Local 183.

[9] On November 2, 2006, the Board (composed of Vice-Chair Jesin) issued the decision which is the subject of this application. The Board dealt first with the standing of the Jurisdictional Committee. It had originated from a resolution passed by Local 183 in 2002. The Board found that the Committee lacked standing to participate on the file. It confirmed that Messrs. Dionisio and Dias are parties to the continuing trusteeship matters. The Board then turned to the complaint of conflict of interest.

[10] The Board set out the test formulated by Sopinka J., on behalf of a Supreme Court majority, in *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235, at 1260 ("*MacDonald Estate*"):

> Typically, these cases require two questions to be answered. (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

[11] The Board made the following findings:

- Until June 12, 2006, Shell Lawyers acted for Local 183; LIUNA placed Local 183 into trusteeship on that day
- Shell Lawyers conceded that as counsel to Local 183, it came into possession of privileged information

- Following June 12, 2006, Shell Lawyers acted for the nominated delegates of Local 183 to the LIUNA convention and for Messrs. Dias and Dionisio
- After June 12, 2006, Shell Lawyers continued to advocate on behalf of its remaining clients, as it had on behalf of Local 183, for a result which would take control of the Local away from LIUNA
- The real and substantive respondents to the positions advanced by Shell Lawyers are LIUNA and its appointed Trustee for Local 183; the Local now supports LIUNA's position
- Any information possessed by Shell Lawyers was received from, or was within the knowledge of, its present clients, Messrs. Dionisio and Dias, and it is the knowledge and information possessed by them that LIUNA and Local 183 were really concerned with.

[12] In its analysis, the Board first sought to distinguish the position of Shell Lawyers from what it regarded as the normal case of conflict of interest. Vice-Chair Jesin wrote:

> The case before me is significantly different from the normal case in which the question of conflict arises. In this case the former executive of local 183 resisted attempts by LIUNA to wrest control of the local from the executive and to place it in the hands of a trustee appointed by LIUNA. Instead, the former executive, who had been elected by the membership, sought to maintain control and authority over the local. By the decision of June 12, 2006 however, it was determined that LIUNA did have just cause to place a trustee in control of the local. However, other ancillary orders were made against LIUNA and the Board expressly retained jurisdiction to consider and vary those orders, when necessary.

[13] The Board then purported to address the risk of use of confidential information possessed by Shell Lawyers derived from acting for Local 183 to the prejudice of Local 183. Vice-Chair Jesin wrote:

> Clearly, the Supreme Court indicated that if, on an objective basis, there is a risk that the law firm will use confidential information to the prejudice of the party opposite, it must be disqualified. However, in assessing this question it is still important to bear in mind the need to have a party retain a solicitor of its choosing.
>
> In addition, it is important to consider the particular circumstances and context in each case, to determine whether there is a potential for real prejudice resulting from the disclosure of such confidential information. This is highlighted in the Superior Court's decision at an earlier stage of these same proceedings (reported at 2004 O.L.R.B. Rep., March/April 471). That decision dealt with the question of whether another firm, acting for LIUNA at that time was in a conflict. The Court confirmed that the Board not only had the jurisdiction to

> determine whether the law firm was in conflict, but that it was a more suitable tribunal than the court for making that determination in the case before it. ... (*Universal Workers Union, LIUNA Local 183 v. Labourers' International Union of North America* (2004), 78 O.R. (3d) 435 (S.C.J.))
>
> This is not a case where there is an alleged conflict because the law firm has hired a solicitor who used to work for the party opposite. Nor is it a case where the law firm acted for one party in another matter and now seeks to act against that party in a subsequent matter. (Examples of such cases include *Ford Motor Company of Canada v. Osler, Hoskin and Harcourt* (1996), 27 O.R. (3d) 181 and cases cited therein.) Rather this is a case where it is alleged that the law firm which has properly initiated the litigation and that has properly participated for some three years must be removed in the middle of the litigation because it has been unsuccessful to this point. Surely this is a result which is inconsistent with the protection afforded under s. 149 of the Act.
>
> Subsection 149(1) of the Act provides that a parent union may only assume supervision of a local with just cause. Subsection 149(4) expressly provides that where the Board finds that there is just cause for a parent to assume supervision, the Board may make such orders and directions 'as it considers appropriate, including orders respecting the continuing supervision or control of the local trade union'. Thus, section 149 provides the Board with the ability to balance particular labour relations considerations in providing relief subsequent to the imposition of trusteeship. In my view, a conflict is not created when the same protagonists who pursue relief prior to the imposition of a trusteeship, continue to engage the same counsel to seek the same relief subsequent to the imposition of the trusteeship. It would furthermore create unwarranted difficulties in the administration of these provisions if those resisting a trusteeship would be required to retain new counsel to pursue ongoing matters in the same case after trusteeship is sanctioned by the Board.

[14] The Board went on to determine that Shell Lawyers was not in a conflict of interest and it dismissed the motion by LIUNA and Local 183 requesting a disqualification order.

[15] The issues before this Court are:

> i. What is the appropriate standard of review?
>
> ii. Do the Board's decision and approach meet the required standard?
>
> iii. If not, should the decision of the Board that Shell Lawyersis not in conflict be quashed?

Standard of Review

[16] The first task on an application for judicial review is to determine the standard to be applied in scrutinizing the Board's decision. The pragmatic and functional analysis must be used

for this purpose: *Voice Construction Ltd. v. Construction & General Workers Union, Local 92*, 2004 SCC 23 (CanLII), [2004] 1 S.C.R. 609. That approach involves consideration of four contextual factors:

> i) presence or absence of a privative clause or statutory right of appeal;
>
> ii) nature of the question – law, fact, or mixed fact and law;
>
> iii) purposes of the legislation and the provision in particular;
>
> iv) expertise of the tribunal relative to that of the reviewing court.

[17] Most of the appellate authorities, including the seminal case for use of the pragmatic and functional approach, list expertise as the second factor for consideration. I have listed it fourth because I tend to agree with the comment of Laskin J.A. that expertise of the tribunal should not be assessed until the purposes of the provision in issue and the nature of the question are identified. The analysis regarding the first three factors informs to some extent the analysis of the expertise factor: *OPSEU v. Seneca College* (2006), 80 O.R. (3d) 1 (C.A.) at 11, footnote 3. The analysis is not to be regarded as a ritual or a mechanical exercise; its object is to find a legislative intent, enabling the reviewing court to address the core issues in order to determine the degree of deference: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, at para. 26.

i. *Presence or Absence of a Privative Clause or a Statutory Right of Appeal*

[18] The Board's decisions are protected by two strong privative clauses in ss. 114(1) and 116 of the *Act*. No statutory right of appeal is provided from the decision now before the court. The Board is granted "exclusive jurisdiction to exercise the powers conferred on it by the Act"; its actions and decisions are "final and conclusive for all purposes" subject to its own power to reconsider and vary or revoke any decision (s. 114(1)). No decision of the Board "shall be questioned or reviewed in any court, and no order shall be made…or proceedings taken in any court…to question, review, prohibit or restrain the Board or any of its proceedings" (s. 116). These are strong legislative clauses indicating deference to decisions of the Board. Their presence is "compelling evidence that the court ought to show deference…. unless other factors strongly indicate the contrary as regards the particular determination": *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982, at para. 30.

ii. *The Nature of the Question*

[19] The question at issue is whether a law firm should be disqualified due to a conflict of interest. The relevant test is set out by the majority in *MacDonald Estate*. It requires two questions to be answered. The first is whether the lawyer received confidential information attributable to a solicitor and client relationship, which information may be relevant to the matters at hand. The second is whether there is a risk that the confidential information will be used to the prejudice of the former client. The determination of these tests requires an understanding and application not only of the words of the test developed by the Supreme Court of Canada and cited

by the Board in its decision: it requires an understanding of the importance which the Supreme Court of Canada majority placed on maintaining high professional standards in the legal profession in order to protect the public and maintain the confidence of the public in the administration of justice: *MacDonald Estate*, at 1259-60. It is a question of general law to be determined in a labour relations context which in this case is factually clear and not difficult for a person of average intelligence, reasonably informed, to grasp.

[20] Regarding the first question, whether a lawyer received confidential information is a question of fact. This was not an issue in the case before the Board because Shell Lawyers admitted that it obtained confidential information from Local 183. In a recent decision of this Court involving production of documents held by Shell Lawyers, the Court found that Shell Lawyers remains in possession and control of approximately ninety-two boxes of Local 183's records which have now been ordered to be produced and held by the solicitors for Local 183, subject to Shell Lawyers having access: *Labourers' International Union of North America, Local 183 v. Shell*, [2007] O.J. No. 471 (S.C.J.).

[21] The remaining issue regarding the first question – whether the confidential information is relevant to the matter at hand – is a question of law: *Republic National Bank of New York (Canada) v. Normart Management Ltd.* (1996), 31 O.R. (3d) 14 at 15 (Gen. Div.); *Caputo v. Imperial Tobacco Ltd.*, [2003] O.J. No. 2269 (S.C.J.), at paras. 36, 38, 42.

[22] Regarding the second question posed by *MacDonald Estate*, since the use or misuse of confidential information is not susceptible of proof, the test is whether the reasonably informed person would be satisfied that the use of confidential information would not occur: *MacDonald Estate*, at 1260. Where a lawyer has relevant confidential information obtained from a former client now opposed in interest, the lawyer cannot act against the former client. It is presumed that the public represented by the reasonably informed person would conclude that the information would be used to the prejudice of the former client regardless of assurances or even undertakings not to use it (*ibid.* at 1261). In the case of a law firm that employs a lawyer who has relevant confidential information, disqualification may not necessarily be automatic: the Supreme Court left open the possibility that the presence of reasonable institutional mechanisms, such as Chinese walls and cones of silence, might satisfy the reasonably informed person that the confidential information would not be used. The Court was clear, however, that undertakings, assurances and affidavits would not be sufficient (*ibid.* at 1261-3). In this case, we are dealing not with an individual lawyer but with an entire law firm. Shell Lawyers did not take the position that it had established reasonable institutional mechanisms to protect against the use of confidential information obtained from Local 183. Therefore, all of the partners and associates at Shell Lawyers are privy to the confidential information obtained from Local 183.

[23] As a consequence, the question to be decided by the Board was whether the confidential information obtained by Shell Lawyers was relevant to the issue at hand. As mentioned above, relevancy is a question of law, which suggests less deference is owed.

iii. *The Purposes of the Legislation and the Provision in Question*

[24] The purposes of the legislation are expressed in s. 2 of the *Act*: they are generally to encourage and facilitate collective bargaining and expeditious resolution of workplace disputes. Section 149 protects local trade unions in the construction industry from actions by their parent

unions, while recognizing the Board's power to make orders that it considers appropriate where a parent union has acted with just cause. Take away the context of this case, and I would agree with counsel for the respondent Board and Shell Lawyers that the Board must balance many interests to achieve these objectives. Determining whether there is a disqualifying conflict of interest, which is the focus of this case, does not involve the balancing of competing labour relations' interests. This issue is a matter that can and does arise before various tribunals and the courts. The issue transcends labour relations. It is rooted in the control of the conduct of officers of the court in "legal proceedings" that may affect the administration of justice: *MacDonald Estate*, at 1245. "Legal proceedings" include proceedings before the Board: *Universal Workers' Union v. Labourers' International Union of North America*, [2004] O.J. No. 2249, at para. 10 (S.C.J.). While the suggestion of counsel for the Board that the interest of expedition in supervising disputes militates towards the Board handling such ancillary matters, the issue of disqualification by reason of conflict of interest does not engage the purposes of the *Act* or of s. 149.

[25] In the particular context of this case, I fail to see how the purpose of the *Act* and s. 149(4) in particular support the contention that the Legislature intended reviewing courts to defer to the Board on the question of whether a disqualifying conflict of interest exists.

iv. *Expertise*

[26] Relative expertise is the most important of the contextual factors: *Canada (Director of Investigation and Research) v. Southam Inc.* (1997), 1 S.C.R. 758 at para. 50; *Pushpanathan, supra*, at paras. 32-33. The expertise of the Labour Relations Board as a highly-specialized tribunal in the labour relations field is well recognized: *Ivanhoe Inc. v. UFCW, Local 500* 2001), 201 D.L.R. (4th) 577 at para. 25 (S.C.C.). It has dealt with disputes between parent and local unions which are serious and highly acrimonious, sometimes lasting over several years. Such disputes sometimes result in destabilizing attempts to create new unions, severing of an existing union from its parent, and interference with individual participation in union processes: *IUBAC, Locals 6, 7 & 25 v. Brick and Allied Craft Union of Canada*, [2004] O.L.R.B. Mar./Apr. 193, at paras. 14 - 15. There is also no doubt that courts have recognized that the Board is "master of its own house", not only as to all questions of fact and law within its jurisdiction, but regarding all questions of procedure when acting within that jurisdiction: *Re Cedervale Tree Services Ltd. v. LIUNA* (1971), 22 D.L.R. (3d) 40, at 49-50 (Ont. C.A.). That said, there is nothing about the issue of disqualification of a solicitor for conflict of interest that addresses the core labour expertise of the Board. It is an issue that encompasses all legal proceedings. Therefore, it cannot be said that the Board has greater expertise than the courts in this regard. More particularly, the question for the Board in this case is one of law and standards in the legal profession pertaining to protection of the public. The courts are better situated than the Board to answer such a general question of law.

[27] In support of the assertion that the Board has greater relative expertise, the respondents relied on the decision of Nordheimer J. in *Universal Workers Union, supra*. That case is clearly distinguishable. In that case, an application was brought for a declaration that a law firm appearing before the Board was in a disqualifying conflict of interest. The Board had expressed doubts about its ability to make such a determination and therefore refused to make a ruling. Nordheimer J. concluded that the Board had jurisdiction to determine whether a disqualifying conflict of interest existed (at paras. 19-22). Since both the Superior Court and the

Board had concurrent jurisdiction to deal with the issue. Nordheimer J. had to decide which was "the more appropriate body to make the determination". Justice Nordheimer concluded that the Board was the most appropriate body, in part because of the specialized expertise of the Board:

> The Board is in a much better position, with its specialized knowledge and expertise, to know whether the lawyer or law firm is in possession of confidential information, whether the confidential information is relevant to the issues that the Board has to determine, and whether that confidential information could be used to the detriment of the objecting party. It makes more sense for the tribunal, who must make the ultimate determination of the issues on the hearing before it, to decide whether any conflict alleged against the lawyer is real or only apparent, based on the usual practices of the lawyers and law firms who appear before it. (*Universal Workers Union, supra*, at para. 24)

[28] It is this statement that the respondents rely on to support their assertion that the Board has greater expertise than the courts on this issue. However, Nordheimer J.'s words must be understood in their context. He was not engaging in a judicial review. He was not engaging in a pragmatic and functional analysis, as the Court now is required to do. Rather, he was applying the test set out in *Equity Waste Management of Canada v. Halton Hills (Town)* 1997 CanLII 2742 (ON C.A.), (1997), 35 O.R. (3d) 321 (C.A.) to determine which body was most appropriate to deal with this issue at first instance. There is no suggestion in Nordheimer J.'s reasons that he was concluding that the Board's expertise would always, and in all circumstances, exceed that of the courts on the issue of disqualifying conflicts of interest.

[29] Considering all four factors, the first factor indicates a strong level of deference to the Board; all of the other factors indicate that this is primarily a legal issue, a question of law of general application with which the Court is better equipped to deal. The Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 at para. 68, said that the correctness standard of review will rarely be applied in the context of labour adjudications. The case at bar is one of those rare cases. In my opinion, the interplay of the four contextual factors indicates that the Legislature did not intend reviewing courts to give deference to the Board when it decides whether a law firm is in a disqualifying conflict of interest. In the particular circumstances of this case, this analysis leads me to the conclusion that the proper standard of review is one of correctness.

Application of the Standard of Correctness

[30] Before considering the Board's decision, it is important to appreciate the values adopted, as well as the concepts discarded, by the Supreme Court of Canada in *MacDonald Estate*. There is no doubt that the Board attempted to use the words of the test from that case. However, in my view the Board failed to appreciate its meaning and how it is must be applied in order to protect the important public and professional interests involved. Whether this court accepts the Board's assumption that all of the privileged knowledge obtained by Shell Lawyers during its Local 183 retainer came from Messrs. Dionisio and Dias or not, the possible prejudice to the former client, Local 183, must be approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice.

[31] In *MacDonald Estate*, Sopinka J. was dealing not only with the strict fact situation before the Court – a junior lawyer moving from the law firm representing one party to that of the party's opponent in litigation; the Court was setting the standard to be applied to the determination of what is a disqualifying conflict of interest. He listed initially the three competing values: maintenance of professional standards and the integrity of the system of justice; the ability of litigants to be able to choose their own counsel; and the desirability of permitting reasonable mobility in the legal profession. The majority's decision in *MacDonald Estate* recognized the context within which their deliberation was occurring, one of increasingly large legal firms, demand for access to all-purpose firms, and reflection of the changing practice of law in changes to some ethical practices such as advertising to the public.

[32] Despite such changing conditions, Sopinka J., for the majority, wrote of the continued importance of a high standard of conduct in the legal profession, in the following terms at 1243-4:

> Merger, partial merger and the movement of lawyers from one firm to another are familiar features of the modern practice of law. They bring with them the thorny problem of conflicts of interest. When one of these events is planned, consideration must be given to the consequences which will flow from loss of clients through conflicts of interest. To facilitate this process some would urge a slackening of the standard with respect to what constitutes a conflict of interest. In my view, to do so at the present time would serve the interest of neither the public nor the profession. The legal profession has historically struggled to maintain the respect of the public. This has been so notwithstanding the high standards that, generally, have been maintained. When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.

[33] After referring to several professional codes of conduct, Sopinka J. turned to the two historic approaches to determining whether a disqualifying conflict of interest exists:

> i) the probability of real mischief;
>
> ii) the possibility of real mischief.

He considered at some length legal authorities in the United Kingdom, the United States, Australia, New Zealand and Canada. The majority of the Court concluded that the "probability of mischief" standard was not sufficiently high to meet the public requirements that there be an appearance of justice. Sopinka J. wrote at 1259-60:

> The probability of mischief test is very much the same as the standard of proof in a civil case. We act on probabilities. This is the basis of *Rakusen*. I am, however, driven to the conclusion that the public, and indeed lawyers and judges, have found that standard wanting. In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in *Rakusen*, 'that is a thing which you cannot prove'. (p. 841). I would add 'or disprove'. If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

[34] In this case, Local 183 does not consent, and is objecting to, the retainer of Shell Lawyers by parties now opposed in interest to Local 183. This is not a case, as Mr. Shell's submissions attempted to presume, where his former client has disappeared or its existence as a continuing entity representing some 30,000 labourers has been totally subsumed. Local 183 objects to Mr. Shell and his firm now acting against its interest in the same chain of litigation as they once represented that Local.

[35] Shell Lawyers concedes part of the first test from *MacDonald Estate*. It concedes that the firm, its partners and associates are in possession of confidential information obtained from, or through its retainer with, Local 183. However, Shell Lawyers does not concede that it came into possession of confidential information relevant to the matters at hand. Mr. Shell submitted that, because the matters now before the Board involving Local 183 do not pertain to pre-June 12, 2006 events or issues, Shell Lawyers does not come within the first part of the *MacDonald Estate* test. The applications before the Board are concerned with the Local 183 delegate issues regarding LIUNA conventions, the termination of staff in the wake of the trusteeship, stripping Local members of their membership in Local 183, standing of the Jurisdictional Committee, representation of Local 183 members, and so forth. Shell Lawyers therefore suggests that it has no information from Local 183 relevant to the matters at hand. Mr. Shell also stated that Messrs. Dionisio and Dias are not seeking damages or reinstatement as alleged by Mr. Lenczner for Local 183, and are opposed in interest to Local 183 only to the extent that Local 183 should not be controlled by LIUNA. He submitted that there is no distinction in law for labour relations purposes under s. 149 of the *Act* between Local 183 and LIUNA, because the Board concluded that the Trustee for Local 183 serves at the pleasure of the President of LIUNA.

[36] These submissions miss the point. They ignore the fact of Local 183's continued existence as a legal entity and its continued position representing its members for labour relations

purposes. A change in control and public positions of an entity or a change of mind by a person do not alter that entity's or person's continued existence as a former client who imparted confidential information in reliance on the counsel's duties of loyalty to the client and to not use privileged information obtained from that client against the former client's interest.

[37] As to assurances from Shell Lawyers that none of the confidential information is relevant, that proposition fails to meet the test in *MacDonald Estate*, and is fallacious. First, while the Board may be dealing with post-June 12th events, there remains every possibility that pre-June 12th information will be used and is usable to shape, challenge, and cross-examine the case involving Local 183's present leadership and conduct *vis-à-vis* its members and its parent union. The mere offering of an assurance by the solicitor/counsel and his firm that none of the confidential information is relevant because the applications presently before the Board arise from post-June 12th events, is self-serving and fails to meet the objective test of perception of the public in *MacDonald Estate*.

[38] Second, the Board did not find, in either the conflict decision of November 2 or in its reasons for the order of June 12, 2006, that pre-June 12 events and conduct were no longer relevant to the continuing issues before it. In fact, the Board in its reasons outlines the history before June 12 and lists the sixteen findings of misconduct by officials of Local 183 which led to the decision by LIUNA to establish emergency trusteeship in 2004. It also refers to the four findings of misconduct by the independent hearing officer, all before June 12, which history is inescapably part of the considerations regarding issues of implementation of the trusteeship order, including reinstatement of former officials, terminating others, the plan to overcome the problems predating June 12 and eventual removal of the trusteeship and the conditions thereof. The past is still part of the present and future of these parties, and the Board finds or infers no 'relevance' line in the sand at June 12, 2006.

As to the second question within the *MacDonald* test – risk of misuse – the Supreme Court held as follows:

> *A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying 'trust me'. This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica, supra*, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public.
>
> These standards will, in my opinion, strike the appropriate balance among the three interests to which I have referred. In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public in retaining counsel of her choice and the interest of the profession in permitting lawyers to move from one firm to another, the standards are sufficiently flexible to permit a solicitor to

> act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

The Board's decision fails to deal with the objectivity and reasonable perception requirements of the *MacDonald Estate* test.

[39] The Board found that Shell Lawyers, in now acting for the respondents in opposition to the interests of Local 183 as it now exists, are merely advancing the same interest they have always advanced. This fails to meet either part of the test in *MacDonald Estate* which focused on the use and misuse of relevant confidential information obtained during its Local 183 retainer. Yes, Local 183's position in now supporting LIUNA has changed and Shell Lawyers is now acting for two members of the former executive against LIUNA and its former client. But the Board's conclusion fails to meet the fact of possession of privileged information by Shell Lawyers and the inference that Shell Lawyers now act for clients opposed in interest to Local 183 without effecting any structural safeguard against possible misuse of the information.

[40] Second, the Board accepts the proposition that the only information Shell Lawyers have is that received from the knowledge of its present clients, Dionisio and Dias. It did so apparently without any evidence to support the proposition, whether by showing that none of the partners or associates sought information from or talked to any member of Local 183 or its executive other than those two, or by establishing that some device similar to cones of silence was put in place. Even if one accepts that proposition at face value, in the absence of any credible evidence of how it reasonably could be true, it fails the public perception/risk of misuse test in *MacDonald Estate*.

[41] Finally, the Board appears to have adopted a 'balance of convenience' test when dealing with the issue. It states that this is not a case where the law firm acted for one party and now seeks to act against that party in a subsequent proceeding. The Board refuses to contemplate disqualification, not because the conflict is resolved, but because it occurs during the same litigation and because it is deemed to be inconsistent with "the protection afforded under s. 149 of the *Act*". Section 149 looks to protection of the local union, not to former executive members or individuals, and the Board itself found that the trusteeship of Local 183 was imposed with just cause due to serious irregularities and other misconduct. Again, the Board's finding fails to meet the substantial concerns of professional integrity and protection and expectations of the public towards the legal profession. The ability of a person to choose his own lawyer is an important consideration, especially during the litigation; however, as Sopinka J. for the majority in *MacDonald Estate* made clear, it is not the predominant interest when dealing with the issue of conflict of interest.

[42] The Supreme Court, in *MacDonald Estate*, at 1261, held in regard to the risk of misuse branch of conflict of interest:

> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or

> her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. [emphasis added]

[43] Another aspect of the problem represented by this case is the duty of loyalty to a client. In the case of *R. v. Neil*, 2002 SCC 70 (CanLII), [2002] 3 S.C.R. 631, at 641, the Supreme Court spoke of this duty in the following terms:

> …but the defining principle – the duty of loyalty – is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: *MacDonald Estate v. Martin*, 1990 CanLII 32 (S.C.C.), [1990] 3 S.C.R. 1235, at pp. 1243 and 1265, and *Tanny v. Gurman*, [1994] R.D.J. 10 (Que. C.A.). Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies: *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445. As O'Connor J.A. (now A.C.J.O.) observed in *R. v. McCallen* 1999 CanLII 3685 (ON C.A.), (1999), 43 O.R. (3d) 56 (C.A.), at p. 67:
>
> > …the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case.
>
> The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests.

[44] The Supreme Court of Canada recently re-affirmed the *MacDonald Estate* principles and the risk to the administration of justice by the appearance of unfairness resulting from solicitor-client information being in the possession of those opposed to the former client: *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] S.C.J. No. 35 (S.C.C.), at para. 34.

[45] In failing to apply the law and to appreciate the high professional and reasonable public expectations of lawyers and the legal profession given predominance in *MacDonald Estate*, the Board decided incorrectly. The application for judicial review is granted. The decision of the Board of November 2, 2006 in respect of Shell Lawyers' conflict of interest is quashed and it is ordered that Shell Lawyers shall cease to act against its former client, Local 183.

[46] Counsel may make brief written submissions on costs within thirty days.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 2007

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0397-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. David Brown Construction Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of David Brown Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of David Brown Construction Ltd. in all sectors of the construction industry in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1190-06-R: Labourers' International Union of North America, Local 527 (Applicant) v. Greely Construction Inc. (Respondent)

Unit: "all construction labourers the employ of Greely Construction Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (25 employees in unit)

1966-06-R: Labourers' International Union of North America, Local 506 (Applicant) v. Compass Construction Resources Ltd. (Respondent)

Unit: "all construction labourers in the employ of Compass Construction Resources Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Compass Construction Resources Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit) *(Having regard to the agreement of the parties.)*

2788-06-R: Brick and Allied Craft Union of Canada (Applicant) v. Diamond Masonry & Contracting Inc. (Respondent)

Unit: "all bricklayers, stonemasons and plasterers and their respective apprentices, improvers and working forepersons in the employ of Diamond Msonry & Contracting Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin" (10 employees in unit)

2842-06-R: International Union of Painters and Allied Trades, Local 200 (Applicant) v. Vitrerie Lessard Inc. (Respondent)

Unit: "all glaziers, glaziers' apprentices and metal mechanics in the employ of Vitrerie Lessard Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all glaziers, glaziers' apprentices and metal mechanics in the employ of Vitrerie Lessard Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

3056-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hooters Canada, Hooters Holdings Inc., Hooters, Hooters of America Inc., Dwtn Toronto Wings Company (Respondents)

Unit: "all carpenters and carpenters' apprentices in the employ of Dwtn Toronto Wings Company in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Dwtn Toronto Wings Company in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3280-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Peters Excavating Inc. (Respondent)

Unit: "all construction labourers in the employ of Peters Excavating Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Peters Excavating Inc. in all sectors of the construction industry, in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3305-06-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. 1141002 Ontario Ltd. c.o.b. as Advantage Electric (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of 1141002 Ontario Ltd. c.o.b. as Advantage Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of 1141002 Ontario Ltd. c.o.b. as Advantage Electric in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

3354-06-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Aqua Mechanical Contracting Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Aqua Mechanical Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Aqua Mechanical Contracting Ltd. in all sectors of the construction industry in the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3419-06-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Inspectview Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen, and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Inspectview Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all electricians and electricians' apprentices, all linemen, and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Inspectview Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3507-06-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Mapleridge Mechanical Contracting Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Mapleridge Mechanical Contracting Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Mapleridge Mechanical Contracting Inc in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (16 employees in unit)

3508-06-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Tesla Electric (Windsor) Inc. (Respondent)

Unit: "all construction labourers in the employ of Lakeview Group Ltd. and Lakeview Homes Inc. and Lakeview Homes (Whitby II) Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (3 employees in unit)

3556-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Lakeview Group Ltd. and/or Lakeview Homes inc. and/or Lakeview Homes (Whitby II) Inc. (Respondents)

Unit: "all construction labourers in the employ of Lakeview Group Ltd. and Lakeview Homes Inc. and Lakeview Homes (Whitby II) Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non- working foreman" (3 employees in unit)

3594-06-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Switch Electric Limited (Respondent)

Unit: "all electricians and electricians' apprentices, linemen and linemen apprentices, network cabling specialists and network cabling specialists' apprentices and communication cable installers in the employ of Switch Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all electricians and electricians' apprentices, linemen and linemen apprentices, network cabling specialists and network cabling specialists' apprentices and communication cable installers in the employ of Switch Electric Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

3610-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Newman Bros. Limited (Respondent)

Unit: "all construction labourers in the employ of Newman Bros. Limited, in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3633-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Alberici Constructors (Respondent)

Unit: "all construction labourers in the employ of Alberici Constructors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Alberici Constructors in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (9 employees in unit)

3634-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Getsco Technical Services Inc. (Respondent)

Unit: "all construction labourers in the employ of Getsco Technical Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario all construction labourers in the employ of Getsco Technical Services Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0561-04-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Comstock Canada Ltd. (Respondent) v. Brighton Beach Power Ltd. (Intervenor)

Unit: "all construction labourers in the employ of Comstock Canada Ltd. in all sectors of the construction industry in the Counties of Essex and Kent excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of Intervenor	0
Number of ballots segregated and not counted	0

0924-04-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canform Structures Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all carpenters and carpenters apprentices in the employ of Canform Structures Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant" (30 employees in unit)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4185-04-R: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eastern Construction (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all carpenters and carpenters apprentices in the employ of Eastern Construction Company Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2911-05-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Encore Sales (Respondent)

Unit: "all employees of Encore Sales in the City of Vaughan, save and except supervisor and those above the rank of supervisor, office, clerical and sales staff, and pending the resolution of the status of these categories, excluding as well warehouse clerks" (152 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	159
Number of persons who cast ballots	142
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	135
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	85
Number of ballots marked against applicant	50
Number of ballots segregated and not counted	7

4104-05-R: Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. Sun Media Corporation c.o.b. as The Ottawa Sun (Respondent)

Unit: "all employees of the responding party in its Editorial Department in the City of Ottawa, save and except supervisors and managers, persons above the rank of supervisor and manager and persons employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Labour Relations Act, 1995" (42 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	59
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	14

1392-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Onyx Chemical Cleaning Inc. (Respondent) v. International Union of Painters and Allied Trades, Ontario Provincial Council (Intervenor)

Unit: "all employees of Onyx Chemical Cleaning Inc. employed at and operating out of the City of Hamilton, save and except supervisors and persons above the rank of supervisor, office clerical and sales staff" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6

Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

1911-06-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Nanticoke Christian Senior Citizen Home Inc. o/a Parkview Meadows Retirement Village (Respondent)

Unit: "all employees employed by the Nanticoke Christian Senior Citizen Home Inc. o/a Parkview Meadows Retirement Village in the City of Townsend, save and except the Supervisors and those above the rank of Supervisor" (92 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	103
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	10

2251-06-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Penske Logistics (Respondent)

Unit: "all clerical employees of Penske Logistics working at 650 Riverview Line, R.R. #5, Chatham, Ontario, N7M 5J5, save and except supervisor, persons above the rank of supervisor and those persons covered under an existing collective agreement" (39 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	13

2288-06-R: Service Employees International Union Local 1.on (Applicant) v. Comcare Health Services (Respondent)

Unit: "all employees of Comcare Health Services in the Greater Toronto Area, save and except coordinators, supervisors, persons above the rank of supervisor, registered nurses, physiotherapists, occupational therapists, speech and language pathologists, social workers, and delivery sales people, office, clerical and technical staff" (234 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	180
Number of persons who cast ballots	111
Number of ballots excluding segregated ballots cast by persons whose names	108

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	86
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	2

2478-06-R: Service Employees International Union Local 1.on (Applicant) v. Sunrise of Unionville (Respondent)

Unit: "all employees of Sunrise of Unionville employed at 38 Swansea Road, Town of Markham, save and except Coordinators, persons above the rank of Coordinator, registered and graduate nurses employed in a nursing capacity, and office and clerical staff." (85 employees in unit)

Number of names of persons on revised voters' list	95
Number of persons who cast ballots	90
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	81
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	55
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	9

2505-06-R: Teamsters Local Union No. 879 (Applicant) v. 4 REFUEL Canada Ltd. (Respondent)

Unit: "all operators of 4 REFUEL Canada Ltd. working in or out of the City of Hamilton, save and except supervisors, those above the rank of supervisors, office, clerical and sales staff" (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

3092-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1531177 Ontario Inc. o/a SDM Systems (Respondent)

Unit: "all employees of 1531177 Ontario Inc. o/a SDM Systems in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, sales and retail staff, persons engaged in work at 536/544 Second Line West, and persons engaged in residential duct cleaning" (16 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	10

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3239-06-R: Southwestern Ontario Health Care and Service Workers Union, Local 303, affiliated with Christian Labour Association of Canada (Applicant) v. 832426 Ontario Limited c.o.b. as Courtyards of Parkway (Respondent)

Unit: "all employees of 832426 Ontario Limited c.o.b. as Courtyards of Parkway in the City of Windsor, save and except property managers, persons above the rank of property manager, superintendents and office and clerical staff" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	5

3274-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. PL Foods Ltd. (Respondent)

Unit: "all employees of PL Foods Ltd. In the Town of Halton Hills, Ontario, save and except supervisors, persons above the rank of supervisor, sales staff, technical staff, office and clerical staff" (256 employees in unit) (Clarity Note) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	270
Number of persons who cast ballots	216
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	204
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	119
Number of ballots marked against applicant	83
Number of ballots segregated and not counted	12

3276-06-R: Service Employees International Union Local 2.ON, Brewery, General and Professional Workers' Union (Applicant) v. Unicco Facility Services Canada Company (Respondent)

Unit: "all employees of Unicco Facility Services Canada Company in the City of Oshawa save and except supervisors and persons above the rank of supervisor" (110 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	111
Number of persons who cast ballots	73
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	70
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	3

3277-06-R: Service Employees International Union Local 2.ON Brewery, General and Professional Workers' Union (Applicant) v. Unicco Facility Services Canada Company (Respondent) v. Labourers International Union of North America Local 183 (Intervenor)*(Having regard to the agreement of the parties.)*

Unit: "all employees of Unicco Facility Services Canada Company working at 250 Yonge St., 20 Queen St. West, 1 Dundas St. West and 220 Yonge St. in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (53 employees in unit)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	40
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	26
Number of ballots marked in favour of intervenor	13
Number of ballots marked in favour of no union	1
Number of ballots segregated and not counted	0

3302-06-R: Teamsters Local Union 847 (Applicant) v. Big Island Bakery Ltd. c.o.b. as Scotch Bakery (Respondent)

Unit: "all employees of Big Island Bakery Ltd. c.o.b. as Scotch Bakery in the City of Burlington, Ontario, save and except Assistant Manager and those above the rank of Assistant Manager" (9 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

3311-06-R: United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Applicant) v. 2063849 Ontario Inc. o/a Novotel Toronto Airport (Respondent)

Unit: "all employees of 2063849 Ontario Inc. o/a Novotel Toronto Airport in the City of Toronto, save and except supervisors (including executive chef and executive housekeeper) and those above the rank of supervisor, front desk, sales, office and clerical staff, accounting and night audit" (22 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	0

3329-06-R: Teamsters Local Union No. 938 (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as OLG Casino Thousand Islands (Respondent)

Unit: "all Security Officers of the responding party employed at Ontario Lottery and Gaming Corporation c.o.b. as OLG Casino Thousand Islands in Gananoque, Ontario, save and except Security Supervisors and persons above the rank of Security Supervisor, students employed during the school vacation period, surveillance officers, office and clerical staff" (50 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	5

3330-06-R: The Canadian Union of Public Employees (Applicant) v. Regeneration House Inc. (Respondent)

Unit: "all employees employed by Regeneration House Inc. in the City of Toronto, save and except office and clerical employees, clients employed by Regeneration House Inc., supervisors and persons above the rank of supervisor" (41 employees in unit)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	0

3331-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. SnowBear Limited (Respondent)

Unit: "all employees of SnowBear Limited in the City of Guelph, save and except supervisors, those above the rank of supervisor, office, clerical, sales and purchasing" (103 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	113
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	112
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	64
Number of ballots marked against applicant	49
Number of ballots segregated and not counted	0

3336-06-R: Canadian Union of Public Employees (Applicant) v. Amica (Bayview) Corporation (Respondent)

Unit: "all employees of Amica (Bayview) Corporation, Amica at Bayview Retirement Home, in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (30 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

3351-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Grand Toronto Venture L.P. c.o.b. as Park Hyatt Toronto (Respondent)

Unit: "all employees of Grand Toronto Venture L.P. c.o.b. as Park Hyatt Toronto in the City of Toronto in the following classifications: Service Bartender; Stool Bartender; Composite Bartender; Bar Bus Help; Server; Banquet Wait Service; Room S. Wait Staff; and Mini Bar; save and except supervisors, employees above the rank of supervisor, and employees covered by a collective agreement as of January 30, 2007" (56 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	56
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

3352-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Unicco Facility Services Canada Company (Respondent)

Unit: "all employees of Unicco Facility Services Canada Company employed at or out of 290 Yonge Street, Sears, Eaton Centre, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor" (24 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

3353-06-R: Service Employees International Union Local 1.on (Applicant) v. Valleyview Residence (Respondent)

Unit: "all employees of Valleyview Residence, 541 Finch Avenue, West, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff and registered nurses" (140 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	147
Number of persons who cast ballots	101
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	101
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	75
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	0

3405-06-R: Southwestern Ontario Health Care and Service Workers Local 303, affiliated with Christian Labour Association of Canada (Applicant) v. Victorian Order of Nurses (Respondent) v. Practical Nurses Federation of Ontario- LIUNA Local 1110 (Intervenor)

Unit: "all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses Chatham-Kent Branch, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (25 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of Intervenor	5
Number of ballots segregated and not counted	0

3413-06-R: Service Employees International Union Local 1.on (Applicant) v. Hunt Club Manor (Respondent)

Unit: "all employees of Hunt Club Manor in the City of Ottawa, Ontario, save and except registered nurses, supervisor, and persons above the rank of supervisor" (29 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names 2 appear on voter's list	1
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	2

Applications for Certification Dismissed Without Vote

3681-06-R: UNITE HERE Local 75 (Applicant) v. The Suites at 1 King West Inc. and/or Stinson Hospitality Inc. and/or 2076564 Ontario Inc. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

2514-06-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Richardson Foods (A Division of Heinz Canada) (Respondent)

Unit: "all employees of Richardson Foods, Division of Heinz Canada, in the Town of St. Mary's, Ontario, save and except supervisors, persons above the rank of supervisor, and office staff" (161 employees in unit)

Number of names of persons on revised voters' list	161
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	106
Number of segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names do not appear on voters' list	4

2891-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Innvest Hotels GP X Ltd o/a Holiday Inn Select Hotel & Suites Oakville (Respondent)

Unit: "all employees of Innvest Hotels GP o/a Holiday Inn Select Oakville in the City of Oakville, save and except Supervisors those above the rank of Supervisor, and office, clerical, sales and conference services, and security staff." (57 employees in unit)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	51
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	0

3176-06-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. 1537601 Ontario Incorporated c.o.b The Royal On Gordon (Respondent)

Unit: "all employees employed by the responding party at The Royal On Gordon, in the City of Guelph save and except supervisors and those above the rank of supervisors" (35 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	1

3259-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Unicco Facility Services Canada Company (Respondent) v. Service Employees International Union Local 2.ON Brewery, General and Professional Workers' Union (Intervenor)

Unit: "all employees of Unicco Facility Services Canada Company working at 250 Yonge Street; 20 Queen Street West; 1 Dundas Street; and 220 Yonge Street in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (22 employees in unit)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	40
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	26
Number of ballots marked in favour of Intervenor	13
Number of ballots marked in favour of no union	1

Number of ballots segregated and not counted	0

3266-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Unicco Facility Services Canada Company (Respondent) v. Service Employees International Union Local 2.ON Brewery, General and Professional Workers' Union (Intervenor)

Unit: "all employees of Unicco Facility Services Canada Company working at 250 Yonge Street; 20 Queen Street West; 1 Dundas Street; and 220 Yonge Street in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (22 employees in unit)

3379-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Bruce Edmeades Co. (Respondent)

Unit: "all employees of Bruce Edmeades Co. working in and out of the Cities of Cambridge, Kitchener and Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, dispatch and part time who work less than 24 hours a week." (160 employees in unit)

Number of names of persons on revised voters' list	161
Number of persons who cast ballots	143
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	133
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	67
Number of ballots marked against applicant	67
Number of ballots segregated and not counted	9

3406-06-R: Southwestern Ontario Health Care and Service Workers Local 303, affiliated with Christian Labour Association of Canada (Applicant) v. 832426 Ontario Limited c.o.b. as Courtyards of Parkway (Respondent)

Unit: "all superintendents employed by 832426 Ontario Limited c.o.b. as Courtyards of Parkway in the City of Windsor." (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	4

3452-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Eagle Precision Technologies Ltd. (Respondent)

Unit: "all employees of Eagle Precision Technologies Ltd. in the City of Brantford, save and except supervisors, persons above the rank of supervisor, office, clerical, engineering and sales employees, students and employees regularly working for less that twenty-four (24) hours in a week." (75 employees in unit)

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	42
Number of ballots segregated and not counted	4

Applications for Certification Withdrawn

1688-04-R: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Comstock Canada Ltd. (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

2771-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Angel Valley Homes Limited (Respondent)

1199-05-R: Service Employees International Union Local 2.on Brewery, General and Professional Workers' Union (Applicant) v. Steelback Brewery (Respondent)

4135-05-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Middlesex Drywall Ltd. (Respondent)

1875-06-R: International Union of Painters & Allied Trades, Local 1590 (Applicant) v. Onyx Chemical Cleaning Inc. (Respondent)

2061-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Onyx Chemical Cleaning Inc. (Respondent) v. International Union of Painters and Allied Trades, Local 1590 (Intervenor)

2173-06-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 2039843 Ontario Inc., operating as Select Construction (Respondent)

2798-06-R: Labourers' International Unionof North America, Local 1059 (Applicant) v. Diamond Masonry & Contracting Inc. (Respondent)

3442-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Fernbrook Homes Ltd. (Respondent)

3453-06-R: Health Care and Service Workers Union Local 304 affiliated with Christian Labour Association of Canada (Applicant) v. Meadowcroft Retirement Communities c.o.b. as Bough Beeches Retirment Residence (Respondent) v. Ontario Federation of Health Care Workers, LIUNA Local 1110 (Intervenor)

3455-06-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Toronto Tile

3574-06-R: Ontario Secondary School Teachers' Federation (OSSTF/FEESO) La Fédération des enseignantes-enseignants des écoles secondaires de l'Ontario (OSSTF/FEESO) (Applicant) v. University of Ottawa L'Université d'Ottawa (Respondent) v. The Professional Institute of the Public Service of Canada (Intervenor)

3678-06-R: Canadian Union of Public Employees (Applicant) v. TWD Roads Management Inc (Respondent)

3679-06-R: The Canadian Union of Public Employees (Applicant) v. Providence Healthcare (Respondent)

FIRST AGREEMENT

0046-06-FC: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Halminen Building Corporation (Clarington) (Respondent) *(Dismissed)*

2595-06-FC: Hospitality & Service Trades Union, Local 261 (Applicant) v. Lewisfoods Incorporated (Respondent) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3566-05-R: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Donmar Contraplan Inc. and, Matas Management Services Inc. (Respondents) v. Universal Workers Union Labourers' International Union of North America Local 183 (Intervenor) *(Withdrawn)*

1130-06-R: Service Employees International Union Local 1.on (Applicant) v. 1343975 Ontario Inc. o/a Lucan Restview Retirement Home, 1690461 Ontario Inc. o/a Restview Retirement Home (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

3566-05-R: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Donmar Contraplan Inc. and, Matas Management Services Inc. (Respondents) v. Universal Workers Union Labourers' International Union of North America Local 183 (Intervenor) *(Withdrawn)*

1130-06-R: Service Employees International Union Local 1.on (Applicant) v. 1343975 Ontario Inc. o/a Lucan Restview Retirement Home, 1690461 Ontario Inc. o/a Restview Retirement Home (Respondents) *(Withdrawn)*

2920-06-R: Garda Canada Security Corporation and, Garda Security Group Inc. (Applicants) v. United Steelworkers of America (Respondent) *(Withdrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4223-05-R: Robert Aldsworth (Applicant) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Respondent) v. Halminen Building Corp. (Clarington) (Intervenor) *(Granted)*

Unit: "All construction labourers in the employ of Halminen Building Corporation (Clarington) in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	0
Number of ballots segregated and not counted	0

1090-06-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 124 (Respondent) v. 3199786 Canada Inc. o/a Acoustique S. Mayer (Intervenor) *(Granted)*

2783-06-R: Pamela Ziebarth (Applicant) v. Hospitality & Service Trades Union Local 261 (Respondent) *(Withdrawn)*

Unit: "all employees of Lewisfoods Incorporated located at the Atomic Energy Plant, Chalk River, Ontario, save and except the Manager, Assistant Manager, Chef and Office Staff" (9 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

3172-06-R: Rosemary Moran (Applicant) v. Service Employees International Union, AFL-CIO, CLC (Respondent) v. Fairyland Retirement Residence (Golden Pond) (Intervenor) *(Terminated)*

Unit: "all employees of Fairyland Retirement Village Ltd. o/a Golden Pond Retirement Residence, save and except Managers, persons above the rank of Manager, salesman, office and clerical staff" (8 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

3256-06-R: The Formwork Council of Ontario (Applicant) v. Rock-Base Construction Ltd. and/or AM & RR Forming Ltd.;, Canadian Construction Workers' Union (Respondents) *(Terminated)*

3316-06-R: Edith Turcotte (Applicant) v. Union des travailleurs et travailleuses unis de l'alimentation et du commerce, Local 175 (Respondent) v. Supermarché de Hearst (Intervenor) *(Dismissed)*

Unit: "(a) The Employer recognizes the Union as the sole and exclusive bargaining agency for employees of the Supermarché de Hearst in the Town of Hearst, except for the two owners, the store manager and the bookkeeper. (b) A "full-time employee" covered by the Agreement is an employee who usually works forty (40) hours a week. (c) A "part-time employee" covered by Annex C of the Agreement is an employee who usually works twenty-four (24) hours or less a week. The conditions of employment for part-time employees are governed by Annex C of the Collective Agreement" (24 employees in unit)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25

Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	22
Number of ballots segregated and not counted	0

3420-06-R: Rocky St. Laurent (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Respondent) v. Action Refrigeration & Electrical, (920057 Ontario Inc.) (Intervenor) *(Granted)*

Unit: "all journeyman foremen, journeyman and apprentice refrigeration and air-conditioning mechanics and maintenance mechanics, save and except persons above the rank of working foreman, in the employ of the employer in the Province of Ontario engaged in all of the employer's maintenance and/or service activities and all construction work in the Province of Ontario other than construction work in the industrial, commercial and institutional sector in the refrigeration and air-conditioning trade." (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

3426-06-R: Brad Drouillard, Joey DiStefano, Angelo DiStefano and Kevin Beaudoin (Applicant) v. Christian Labour Association of Canada, Construction Workers, Local 53 (Respondent) *(Granted)*

3596-06-R: William Eugene Thomas Barfett (Applicant) v. UNITE HERE Ontario Council (Respondent) v. Rieter Automotive Canada, Carpet (Intervenor) *(Granted)*

Unit: "all employees of Magee Rieter Automotive Systems Canada in the City of London, save and except supervisors, those above the rank of supervisor, office, clerical, maintenance technicians, and sales staff. Clarity Note: The position of Quality Co-ordinator is an excluded office position." (133 employees in unit)

REFERRAL FROM MINISTER (SECTION 115 FORMERLY SECT 109)

2878-06-M: Service Employees International Union (Applicant) v. Spin World Diner Inc., Robins Foods (2006) Ltd., Zeifman Partners Inc. (Respondents) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3411-06-U: A & P Canada Co. (Applicant) v. CAW-Canada, Local 414, Basil Hargrove, Michael Langdon, Hemi Mitic, Anthony Falcone, Frank Turco, Vic Allessandro, Vic Lepik, Wilson Tulk, Blair Youden, and Nick Venditello (Respondent) *(Withdrawn)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0175-04-U: Emma Vangou, Neil Goberdhan,, David D'Oliveira, and, Carol Ann Rampersad (Applicants) v. Ministry of Transportation Ontario, Serco DES Inc. and, Randi Wraight (Respondents) *(Terminated)*

4301-04-U: Greater Toronto Sewer and Watermain Contractors Association (Applicant) v. Labourers' International Union of North America;, Labourers' International Union of North America, Ontario Provincial District Council;, Sarp Sewer Service Pickering, Division of Sarp Toronto Inc.;, Sewer-Matic Sewer Services Ltd.;, Telescan Sewer Services Ltd.; and, Trans-Video Inspection Limited (Respondents) v. Universal Workers Union, L.I.U.N.A. Local 183 , International Union of Operating Engineers, Local 793 (Intervenors) *(Dismissed)*

0819-05-U: Michael Locke (Applicant) v. Millwright Regional Council of Ontario, Local Union 1151, (Respondent) v. GETSCO Technical Services Inc. (Intervenor) *(Dismissed)*

1200-05-U: Service Employees International Union Local 2.on Brewery, General and Professional Workers' Union (Applicant) v. Steelback Brewery (Respondent) *(Withdrawn)*

1296-05-U: Larry Bielak (Applicant) v. United Steelworkers of America Local Union No. 3767 (Respondent) v. GenFast Manufacturing Company (Intervenor) *(Dismissed)*

1793-05-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Anishnawbe Mushkiki Community Health Centre (Respondent) *(Withdrawn)*

2698-05-U: Marianna Iwanowska (Applicant) v. UNITE HERE Ontario Council (Respondent) v. Bernard Athletic Knit & Enterprises Limited (Intervenor) *(Withdrawn)*

2850-05-U; 2597-06-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Lewisfoods Incorporated (Respondent); Hospitality & Service Trades Union, Local 261 (Applicant) v. Lewisfoods Incorporated Mr. Les Beale Mr. Mike Gendron (Respondent) *(Withdrawn)*

2973-05-U: Claire Hall (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) v. Conseil scolaire catholique du Nouvel-Ontario (Intervenor) *(Withdrawn)*

3479-05-U: International Union of Bricklayers and Allied Craftworkers, Local 25 (Applicant) v. International Union of Bricklayers and Allied Craftworkers (Respondent) *(Granted)*

4037-05-U: Shah Jahan Khan (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Respondent) v. Carecor Health Services Ltd. (Intervenor) *(Withdrawn)*

0130-06-U: Daney Van Niedek (Applicant) v. Power Workers' Union, Canadian Union of Public Employees Local 1000 - C.L.C. (Respondent) v. Ontario Power Generation Inc. (Intervenor) *(Dismissed)*

0222-06-U: Amalgamated Transit Union, Local 1587 (Applicant) v. Miller Transit Ltd. (Respondent) v. Murray Bist, Leeroy McCalla, Kevah Subero, Brian Coull, Naresh Gupta, Walter Goyetche, Muhammad Azhar and David Phillips (Intervenor) *(Withdrawn)*

0433-06-U: Margaret High (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1986 (Respondent) *(Withdrawn)*

0485-06-U: John Vlaho (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Respondent) *(Dismissed)*

0558-06-U: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Halminen Building Corp. (Clarington), Robert Aldsworth (Respondents) *(Withdrawn)*

0639-06-U: International Union of Operating Engineers, Local 793 (Applicant) v. David Brown Construction Ltd. (Respondent) *(Withdrawn)*

0715-06-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Transcontinental RBW Graphics (Respondent) *(Withdrawn)*

0735-06-U: Laurie Goodsell (Applicant) v. Retail, Wholesale Canada/CAW, Local 462 (Respondent) v. Hershey Canada Inc. (Intervenor) *(Terminated)*

0736-06-U: William John Shulman and Robert James McCollum (Applicant) v. United Steelworkers, Local 1-2693 (Respondent) v. Joseph Lucheski Contracting Ltd., Columbia Forest Products, Levesque Division - Nipigon Woodlands (Intervenors) *(Dismissed)*

1136-06-U: Service Employees International Union Local 1.on (Applicant) v. 1690461 Ontario Inc. o/a Restview Retirement Home (Respondent) *(Withdrawn)*

1140-06-U: Murray Bist, Leeroy McCalla, Kevah Subero, Brian Coull, Naresh Gupta, Walter Goyetche, Muhammad Azhar and David Phillips (Applicant) v. Amalgamated Transit Union, Local 1587 (Respondent) v. Miller Transit Ltd. (Intervenor) *(Withdrawn)*

1405-06-U: Labourers' International Union of North America, Local 527 (Applicant) v. Greely Construction Inc. (Respondent) *(Withdrawn)*

1912-06-U: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Nanticoke Christian Senior Citizen Home Inc. o/a Parkview Meadows Retirement Village (Respondent) *(Terminated)*

2063-06-U: Labourers' International Union of North America, Local 506 (Applicant) v. Compass Construction Resources Ltd. (Respondent) *(Withdrawn)*

2195-06-U: Nicole Mac Intyre (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) v. Arista Homes Limited (Intervenor) *(Dismissed)*

2252-06-U: International Union of Operating Engineers, Local 793 (Applicant) v. International Union of Painters & Allied Trades, Local 1590, Onyx Chemical Cleaning Inc. (Respondents) *(Withdrawn)*

2303-06-U: Labourers' International Union of North America, Local 527 (Applicant) v. Greely Construction Inc. and Kevin Fudge (Respondent) *(Withdrawn)*

2306-06-U: Billie Jo Nolan (Applicant) v. Canadian Union of Public Employees (CUPE) Local 1019 (Respondent) v. Regional Municipality of Niagara (Intervenor) *(Withdrawn)*

2374-06-U: Michael Melvin Pare (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondent) *(Withdrawn)*

2388-06-U: Nohemy Cunningham (Applicant) v. Canadian Union of Public Employees Local 4400 (Respondent) v. Toronto District School Board (Intervenor) *(Dismissed)*

2395-06-U: Canadian Union of Public Employees (Applicant) v. Women's Own Withdrawal Management (University Health Network) (Respondent) *(Withdrawn)*

2425-06-U: Peter Moran (Applicant) v. United Steelworkers of America, Local 9422 (Respondent) v. North American Palladium/Lac des Iles Mines Ltd. (Intervenor) *(Withdrawn)*

2489-06-U: Yu, Jian (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) *(Dismissed)*

2558-06-U: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 2039843 Ontario Inc., operating as Select Construction (Respondent) *(Withdrawn)*

2732-06-U: John Harkin (Applicant) v. Canadian Union of Brewery and General Workers Component 325 (Respondent) v. Molson Canada (Intervenor) *(Dismissed)*

2757-06-U: Blessie K. Cherian (Applicant) v. Sheet Metal Workers International Association Local Union 540 (Respondent) *(Dismissed)*

2785-06-U: Canadian Union of Public Employees and its Local 4705 (Applicant) v. City of Greater Sudbury (Respondent) *(Withdrawn)*

2819-06-U: Anne Dupuis (Applicant) v. Les métallurgistes unis d'Amérique (Respondent) *(Withdrawn)*

2827-06-U: Canadian Office and Professional Employees Union Local 454 (Applicant) v. Lakehead District School Board (Respondent) *(Terminated)*

2849-06-U: Mario Pavao (Applicant) v. Universal Workers Union Local 183 (Respondent) *(Withdrawn)*

2877-06-U: Jemey Ponrajah (Applicant) v. Amalgamated Transit Union (Respondent) v. Trentway-Wagar Inc. (Intervenor) *(Dismissed)*

3013-06-U: Service Employees International Union Local 1.on (Applicant) v. Timiskaming Home Support (Respondent) *(Withdrawn)*

3029-06-U: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Delta Mechanical Ltd. (Respondent) *(Withdrawn)*

3047-06-U: Roselle Beausoleil (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) v. Ministry of Community Safety and Correctional Services (Intervenor) *(Dismissed)*

3087-06-U: Canadian Union of Public Employees and its Local 4811 (Applicant) v. Trilogy Long Term Care Inc. (Respondent) *(Withdrawn)*

3096-06-U: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Raymar Building Contractors Ltd. (Respondent) *(Terminated)*

3284-06-U: Teamsters Local Union No. 879 (Applicant) v. Service Employees International Union Local, 1.On (Respondent) *(Withdrawn)*

3411-06-U: A & P Canada Co. (Applicant) v. CAW-Canada, Local 414, Basil Hargrove, Michael Langdon, Hemi Mitic, Anthony Falcone, Frank Turco, Vic Allessandro, Vic Lepik, Wilson Tulk, Blair Youden and Nick Venditello (Respondents) *(Withdrawn)*

3429-06-U: Dominico Grande (Applicant) v. CUPE Local #79 (Respondent) *(Terminated)*

3579-06-U: Thomas Michael Brian (Applicant) v. Teamsters Local 880 (Respondent) *(Dismissed)*

APPLICATION FOR INTERIM ORDER

3235-06-M: Teamsters Local Union No. 847 (Applicant) v. G & K Services Canada Inc. (Respondent) *(Dismissed)*

3327-06-M: Teamsters Local Union 847 (Applicant) v. Scotch Bakery Ltd. (Respondent) *(Withdrawn) (Having regard to the agreement of the parties.)*

3333-06-M: Grace Mungal., Hector Waldron and, OPSEU (Applicants) v. Community Living Mississauga (Respondent) *(Granted)*

APPLICATIONS FOR CONSENT TO PROSECUTE

2302-06-U: Labourers' International Union of North America, Local 527 (Applicant) v. Greely Construction Inc. and Kevin Fudge (Respondent) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3558-06-M: Stan Kusmierz (Applicant) v. Hyd-Mech Group and, C.A.W. Local 636 (Respondents) *(Terminated)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0617-05-OH: Joe Rooke (Applicant) v. Stelco Hamilton (Respondent) *(Dismissed)*

0063-06-OH: Naomi Kowtook (Applicant) v. LTJ Holdco Inc. (Respondent) *(Terminated)*

1584-06-OH: Mustafa Daginawala (Applicant) v. Supply Chain Management Inc. (Respondent) *(Dismissed)*

1641-06-OH: Frank Centofanti (Applicant) v. Royce Metal Products Inc. (Respondent) *(Withdrawn)* 2123-06-OH: Robert Bruce Post (Applicant) v. Unimin Canada Ltd. (Respondent) *(Withdrawn)*

3072-06-OH: Felicia May Jacobs (Applicant) v. Safety Seal Plastics Inc. (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

2564-05-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. KYIV Architectural Metals, Division of 1440842 Ontario Inc. (Respondent) *(Withdrawn)*

2736-05-G: National Elevator and Escalator Association (Applicant) v. ThyssenKrupp Elevator (Canada) Limited (Respondent) *(Withdrawn)*

2928-05-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J & A General Contractors Inc. (Respondent) *(Dismissed)*

3557-05-G: National Elevator and Escalator Association (Applicant) v. ThyssenKrupp Elevator (Canada) Limited (Respondent) *(Withdrawn)*

3567-05-G: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Donmar Contraplan Inc. and, Matas Management Services Inc. (Respondents) v. Universal Workers Union Labourers' International Union of North America Local 183 (Intervenor) *(Withdrawn)*

0189-06-G: Marble, Tile & Terrazzo, Local 31 (Applicant) v. Caledonia Marble Company Limited (Respondent) *(Withdrawn)*

1999-06-G: Millwright Regional Council of Ontario on its own behalf and on behalf of Millwright Local Union 1425 (Applicant) v. 1309872 Ontario Inc. o/a I.C. Mechanical and Roland Hofmann (Director) and Kevin Whalen (Director) (Respondent) *(Endorsed Settlement)*

2451-06-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Dom-Meridian Construction Ltd. (Respondent) *(Withdrawn)*

2899-06-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. F.D.M. Contracting Co. Ltd. (Respondent) *(Withdrawn)*

2980-06-G: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Inner City Gas Inc. (Respondent) *(Withdrawn)*

2996-6o-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yustin Interiors Ltd. (Respondent) *(Granted)*

3099-06-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2486 (Applicant) v. Gorf Contracting Limited (Respondent) *(Endorsed Settlement)*

3125-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. D & M Steel Ltd. (Respondent) *(Withdrawn)*

3136-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Ellis Don Corporation (Respondent) *(Withdrawn)*

3139-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Ellis Don Corporation (Respondent) *(Withdrawn)*

3178-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. James Donn Piling Limited (Respondent) *(Granted)*

3273-06-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rinlor Construction Ltd. c.o.b. as Fischer Drywall & Acoustics and Sergio Rea (Respondent) *(Endorsed Settlement)*

3313-06-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Bonneville Electric Ltd. (Respondent) *(Withdrawn)*

3318-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. 759408 Ontario Inc. o/a M.M.G. Contracting (Respondent) *(Granted)*

3335-06-G: The International Union of Painters and Allied Trades, Local Union 1824 (Applicant) v. Randy Wilmer c.o.b. as ARC The Painting Company (Respondent) *(Endorsed Settlement)*

3350-06-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Co-Fo Concrete Forming Construction (Respondent) *(Terminated)*

3387-06-G: Labourers' International Union of North America, Local 493 (Applicant) v. Lacroix Construction Co (Sudbury) Ltd. (Respondent) *(Withdrawn)*

3476-06-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Goeff Daryl Hounsell c.o.b. as P & M Caulking (Respondent) *(Endorsed Settlement)*

3532-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1095985 Ontario Limited o/a Urban Interior Contracting (Respondent) *(Granted)*

3548-06-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vidak Kovacevic o/a City Electric (Respondent) *(Granted)*

3615-06-G: Labourers' International Union of North America, Local 837 (Applicant) v. Ciccarelli Bros. Equipment (Respondent) *(Endorsed Settlement)*

APPEALS - EMPLOYMENT STANDARDS ACT

2761-03-ES: Infosys Canada o/a Coffee Time Donuts (Applicant) v. Shahnaz Shourjeh and Director of Employment Standards (Respondents) *(Dismissed)*

2233-04-ES: Tony Baksh a Director of 1570809 Ontario Inc. (Applicant) v. Wen Bo Wang, et al. , Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2672-04-ES: Little Short Stop Stores Ltd. (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

0728-05-ES: Richard Emmett (Applicant) v. D & G Panel & Harness Ltd., Director of Employment Standards (Respondents) *(Dismissed)*

3054-05-ES: Possumplace Kennels (Applicant) v. Theresa Carbonneau, Director of Employment Standards (Respondents) *(Granted)*

3298-05-ES: Delstar (2000) Inc. (Applicant) v. Bharat Singh and, Director of Employment Standards (Respondents) *(Withdrawn)*

3592-05-ES: Catherine Djukic (Applicant) v. Owen-Stewart Performance Resources Inc. and Director of Employment Standards (Respondents) *(Dismissed)*

4234-05-ES: Naomi Kowtook (Applicant) v. LTJ Holdco Inc. and Director of Employment Standards (Respondents) *(Terminated)*

0851-06-ES: Suzanne Brassard (Applicant) v. Brookfield LePage Johnson Controls Facility Management Services Ltd. ("BLJC"), SNC-Lavalin Profac Inc., Director of Employment Standards (Respondents) *(Terminated)*

1380-06-ES: Jack Parent (Applicant) v. M.R. Meat Market, Director of Employment Standards (Respondents) *(Withdrawn)*

1941-06-ES: Mark Westcott (Applicant) v. Costco Wholesale Canada Inc., and Director of Employment Standards (Respondents) *(Withdrawn)*

2152-06-ES: Nahid Keykhosravi (Applicant) v. Real Estate Bazaar Inc. and Director of Employment Standards (Respondents) *(Granted)*

2242-06-ES: Blueprint Interior Design Inc. (Applicant) v. Caroline Ibrahim, and Director of Employment Standards (Respondents) *(Granted)*

2325-06-ES: Philip Innes (Applicant) v. Lee Munro Chevrolet, Director of Employment Standards (Respondents) *(Withdrawn)*

2326-06-ES: Music Legends Limited o/a Hard Rock Cafe (Applicant) v. Warren MacPherson and Director of Employment Standards (Respondents) *(Terminated)*

2540-06-ES: Susan Pound (Applicant) v. Igate Mastech Limited and Director of Employment Standards (Respondents) *(Withdrawn)*

2561-06-ES: Assis J. Simoes (Applicant) v. Tobyn Park Homes and Director of Employment Standards (Respondents) *(Dismissed)*

2563-06-ES: Kevork Torossian (Applicant) v. Compass Group Canada (Beaver) Ltd., Director of Employment Standards (Respondents) *(Withdrawn)*

2565-06-ES: Toral Construction (Applicant) v. Elmer Campos and Director of Employment Standards (Respondents) *(Dismissed)*

2739-06-ES: Pardo De Notaris (Applicant) v. HMS Host, Director of Employment Standards (Respondents) *(Terminated)*

2941-06-ES: Mohamed Manji (Applicant) v. World Famous Sales of Canada Inc., Director of Employment Standards (Respondents) *(Withdrawn)*

3185-06-ES: George Kakarelis, a Director of Robinson Brewing Inc. (Applicant) v. Russell Armitage, and Director of Employment Standards (Respondents) *(Dismissed)*

3210-06-ES: Lorne D. Cameron, Director of Visual Dynamics Inc. (Applicant) v. Wally Appleton, Michael Briggs, Benjamin Flores, Wanping Li and Eva Pusztahegyi, Director of Employment Standards (Respondents) *(Terminated)*

3269-06-ES: Harvest Burger (Applicant) v. Tammy Kerwin and Director of Employment Standards (Respondents) *(Terminated)*

3323-06-ES: Rosa Morano (Applicant) v. Atlas Fluid Systems, and Director of Employment Standards (Respondents) *(Dismissed)*

3373-06-ES: Robert A. Yaansah, a Direct of 6377289 Canada Inc. o/a Eurodesign Furniture Ltd. (Applicant) v. Yu Tang, Janina Bobryznska, Liane Jardine, Maria Digregorio, Nino Noe Aloise , Rajeshwar Sharma, Norina Fuoco, Gino Figliomeni, Ruben Ramirez, Jose Rodriquez, Tadeusz Szut and Director of Employment Standards (Respondents) *(Dismissed)*

3619-06-ES: Royal Group Technologies Limited (Applicant) v. John Ruffolo, Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

0795-01-HS: Armbro Construction Ltd. (Applicant) v. Universal Workers Union, Local 183, Ministry of Labour (Respondents) *(Terminated)*

1500-06-HS: Aimco Staffing (Applicant) v. Joe Zaher, Inspector (Respondent) *(Withdrawn)*

1920-06-HS: Ontario Swine Improvement Ontario Incorporated (Applicant) v. Richard Smelski, Roger Jeffreys, Inspector (Respondents) *(Withdrawn)*

2970-06-HS: Genor Recycling Services Limited (Applicant) v. Erica Arsenault, Inspector (Respondent) *(Withdrawn)*

3421-06-HS; 3422-06-HS: Blue Mountain Resorts Limited (Applicant) v. Richard den Bok, Inspector (Respondent) *(Withdrawn)*

3466-06-HS: Récupération Charland (Applicant) v. Thomas Michaud, L'inspecteur (Respondent) *(Granted)*

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

3199-06-M: Service Employees' International Union, Local 1on (Applicant) v. 1343975 Ontario Inc. o/a Lucan Restview Retirement Home, 1690461 Ontario Inc. O/A Restview Retirement Home (Respondents) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3659-02-R: The Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America, and its Local 1916 (Applicant) v. Industrial Redi-Works Inc. and Resource Industrial Group (RIG) (Respondents) *(Dismissed)*

2433-03-R: The Millwright Regional Council of Ontario, United Brotherhood of Carpenters and Joiners of America, and its Local 1916 (Applicant) v. Industrial Redi-Works Inc. and Ideal Industrial Contractors Inc. (Respondents) *(Dismissed)*

4301-04-U; 3307-06-U: Greater Toronto Sewer and Watermain Contractors Association (Applicant) v. Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council; Sarp Sewer Service Pickering, Division of Sarp Toronto Inc.; Sewer-Matic Sewer Services Ltd.; Telescan Sewer Services Ltd.; and Trans-Video Inspection Limited; Greater Toronto Sewer and Watermain Contractors Association (Applicant) v. Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and, Universal Workers Union, LIUNA Local 183 (Respondents) v. International Union of Operating Engineers, Local 793 (Intervenor) *(Dismissed)*

2407-05-JD: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Aecon Industrial, International Brotherhood of Electrical Workers, Local 115, Ontario Erectors Association, Incorporated, I.B.E.W. Electrical Power Council of Ontario , Electrical Power Systems Construction Association (Respondents) *(Granted)*

4240-05-U: Laura Longman (Applicant) v. The Power Workers Union, Canadian Union of Power Employees Local 1000 (Respondent) v. Ontario Power Generation (Intervenor) *(Dismissed)*

2031-06-U: Iain Douglas (Applicant) v. Ontario Public Service Employees Union (Respondent) *(Dismissed)*

3148-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. All Services Incorporated and/or Coatings Removal Application Services Inc. (Respondent) *(Granted)*

3333-06-M: Grace Mungal., Hector Waldron and, OPSEU (Applicants) v. Community Living Mississauga (Respondent) *(Granted)*

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 2007

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2420-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Matas Homes and/or Matas Construction Limited and/or Matas Management Services Inc. and/or Donmar Contraplan Inc. (Respondent)

Unit: "all construction labourers in the employ of Matas Management Services Inc. or Donmar Contraplan Inc. in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1884-06-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. ACTT Installation Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of ACTT Installation Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of ACTT Installation Ltd. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2341-06-R: United Brotherhood of Carpenters and Joiners of America, Local Union 494 (Applicant) v. P.C.R. Contractors Inc. (Respondent) v. Labourers' International Union of North America, Local 625 (Intervenor)

Unit: "all carpenters and carpenters' apprentices in the employ of P.C.R. Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of P.C.R. Contractors Inc. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

3156-06-R: Canadian Construction Workers' Union (Applicant) v. PBS General Contractors Inc. (Respondent)

Unit: "all construction labourers in the employ of PBS General Contractors Inc. in the residential sector of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non working foreman" (3 employees in unit)

3417-06-R: Christian Labour Association of Canada (Applicant) v. Tamarack Development Corporation (Respondent)

Unit: "all construction labourers, carpenters and carpenters' apprentices in the employ of Tamarack Developments Corporation in all sectors of the construction industry in the City of Ottawa, and the United Counties of Prescott and

Russell, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit)

3639-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hardrock Forming Company (Respondent)

Unit: "all construction labourers in the employ of Hardrock Forming Company in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

3642-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Lockerbie & Hole Inc. (Respondent)

Unit: "all construction labourers in the employ of Lockerbie & Hole Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees in unit)

3668-06-R: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. Brandy Lane Corporation (Respondent)

Unit: "all construction labourers in the employ of Brandy Lane Corporation in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3670-06-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Tribute Communities (Respondent)

Unit: "all construction labourers in the employ of the Tribute Communities in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3738-06-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Cankor Electrical Contractors Ltd., Cankor Electrical Ltd. o/a Cankor Electric (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Cankor Electrical Contractors Ltd., Cankor Electrical Ltd. o/a Cankor Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Cankor Electrical Contractors Ltd., Cankor Electrical Ltd. o/a Cankor Electric in all other sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland and in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and

Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

3756-06-R: Brick and Allied Craft Union of Canada (Applicant) v. Touch of Class Coatings Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the Touch of Class Coatings Inc. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3850-06-R: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Harbridge & Cross Limited (Respondent)

Unit: "all carpenter and carpenters' apprentices in the employ of Harbridge & Cross Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

4029-06-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Bosanac Heating & Electric Limited (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Bosanac Heating & Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Bosanac Heating & Electric Limited in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (5 employees in unit)

4047-06-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Lubek Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Lubek Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Lubek Electric Inc. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

4049-06-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 124 (Applicant) v. Richbuilt Developments Inc. (Respondent)

Unit: "all journeyman and apprentice plasterers and spray fibre applicators, drywall tapers and rigid insulation applicators in the employ of Richbuilt Developments Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all journeyman and apprentice plasterers and spray fibre applicators, drywall tapers and rigid insulation applicators in the employ of Richbuilt Developments Inc. in all sectors of the construction industry in the

City of Ottawa, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0170-04-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Canform Structures Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all construction labourers in the employ of Canform Structures Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant" (18 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	15
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of Intervenor	4
Number of ballots segregated and not counted	1

0171-04-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Eastern Construction Company Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all construction labourers in the employ of Eastern Construction Company Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant" (7 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of Intervenor	1
Number of ballots segregated and not counted	2

1800-04-R: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ellis-Don Corporation (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all carpenters and carpenters apprentices in the employ of Ellis-Don Corporation in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	2

2934-04-R: Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eastern Construction Company Limited (Respondent) v. Electrical Power Systems Construction Association (Intervenor)

Unit: "all carpenters and carpenters apprentices in the employ of Eastern Construction Company Limited in all sectors of the construction industry save and except the industrial, commercial and institutional sector in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements with the applicant" (3 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	2

1317-06-R: Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild (Applicant) v. Free Daily News Group Inc. and 514767 NB Ltd. o/a Metro Toronto (Respondent)

Unit: "all employees of Free Daily News Group Inc. and 514767 NB Ltd. o/a Metro Toronto in the City of Toronto" (62 employees in unit)

Number of names of persons on revised voters' list	59
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	52
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	20

Number of ballots segregated and not counted	5

1916-06-R: International Association of Machinists and Aerospace Workers (Applicant) v. Oshawa Community Credit Union Ltd. (Respondent)

Unit: "all employees of Oshawa Community Credit Union Ltd., in the City of Oshawa, Ontario, save and except supervisors, persons above the rank of supervisor, and persons covered by existing collective agreement" (4 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

3519-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Canadian Mental Health Association, Grand River Branch (Respondent)

Unit: "all employees of the Canadian Mental Health Association, Grand River Branch working in the Crisis Services of Waterloo Region located in the City of Kitchener, save and except Distress Centre Coordinator, team leaders, managers, persons above the rank of Distress Centre Coordinator, and employees of the Centres for Mental Health, Waterloo Regional Self Help, and Mood Disorders of Waterloo" (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	3

3524-06-R: Service Employees International Union, Local 2.ON Brewery, General and Professional Workers' Union (Applicant) v. Ability Janitorial Services Limited (Respondent)

Unit: "all employees of Ability Janitorial Services Limited working at 150 Tunney's Pasture Driveway, 100 Tunney's Pasture Driveway, 170 Tunney's Pasture Driveway, in the city of Ottawa, save and except office and clerical employees, supervisors, and persons above the rank of supervisor" (51 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names	40

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	9

3539-06-R: Service Employees International Union Local 1.on (Applicant) v. The Elmsmere Residence (Respondent)

Unit: "all employees of The Elmsmere Residence in the City of Gloucester, save and except registered nurses, activity director, director of care, supervisors, persons above the rank of supervisor" (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	2

3547-06-R: Teamsters Local Union 938 (Applicant) v. Pival International Inc. (Respondent)

Unit: "all employees of Pival International Inc. in the City of Ajax, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (27 employees in unit) *(Clarity Note)* (Having regard to the agreement of the parties.)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

3552-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tie Trough Inc. (Respondent) v. Universal Workers Union, L.I.U.N.A. Local 183 (Intervenor)

Unit: "all construction employees, including dependant pieceworkers and their helpers, and hourly paid employees engaged in the installation of all types of exterior cladding (including aluminum and vinyl siding), eavestroughing, soffit and fascia employed by Tie Trough Inc., in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in and out of the City of Toronto, the Regional Municipalities of Peel and York.

the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland; the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton; the County of Simcoe and the District Municipality of Muskoka and that portion of 12 West of the Trent-Severn Water way, save and except non-working foremen, persons above the rank of non-working foreman, office, warehouse, shop and clerical employees" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of Intervenor	1
Number of ballots segregated and not counted	0

3584-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. SCI Schiffenhaus Canada Inc. (Respondent)

Unit: "all employees of SCI Schiffenhaus Canada Inc. in the City of Mississauga, Ontario save and except supervisors, persons above the rank of supervisor, office, clerical staff, and sales staff" (70 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	64
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	1

3617-06-R: Labourers' International Union of North America Ontario Provincial District Council (OPDC) (Applicant) v. Aramark Canada Limited (Respondent)

Unit: "all employees of Aramark Canada Facility Services Ltd. employed at the Nova Styrene Refinery in Sarnia, save and except supervisors, persons above the rank of supervisor, office and sales staff" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3

3620-06-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Eberspächer Exhaust Systems Canada Inc. (Respondent)

Unit: "all programmers employed at Eberspächer Exhaust Systems Canada Inc., save and except Supervisors, persons above the rank of Supervisor, Engineering and Staff, and office and clerical and those employees covered by a subsisting collective agreement" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3640-06-R: International Association of Machinists and Aerospace Workers (Applicant) v. Kingsway Arms Management (Clarington) Inc. (Respondent)

Unit: "all employees of Kingsway Arms Management (Clarington) Inc. in the Municipality of Clarington, Ontario, save and except supervisors and persons above the rank of supervisor" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3657-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Omni Facility Services Canada Corp. (Respondent)

Unit: "all employees of Omni Facility Services Canada Limited, employed at 7755-7765 Hurontario Street, in the City of Brampton, in the Province of Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names	11

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3659-06-R: Service Employees International Union Local 1.on (Applicant) v. Chartwell Kanata Retirement Residence (Respondent)

Unit: "all employees of Chartwell Kanata Retirement Residence in the City of Kanata, save and except supervisors, person above the rank of supervisor, activity coordinator and office and clerical staff" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	3

3660-06-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Weston Bakeries Limited (Respondent)

Unit: "all employees of Weston Bakeries Limited employed as Transport Coordinators at 1425 The Queensway, Etobicoke, Ontario, save and except supervisors, those above the rank of supervisor, and persons covered by subsisting collective agreements" (4 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3680-06-R: The Canadian Union of Public Employees (Applicant) v. A Place Called Home, Residence in Lindsay (Respondent)

Unit: "all employees of A Place Called Home, Residence in Lindsay, in the Region of Kawartha Lakes, save and except supervisors, persons above the rank of supervisor and the executive director administrative assistant" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

3690-06-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 affiliated with the International Brotherhood of Teamsters (Applicant) v. Roy Turk Industrial Sales Limited (Respondent)

Unit: "all employees working in and out of Roy Turk Industrial Sales Limited in the Province of Ontario, save and except managers, persons above the rank of manager and office and sales staff" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots 0	
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	2

3696-06-R: International Association of Machinists and Aerospace Workers (Applicant) v. 1595737 Ontario Limited o/a Courtyard by Marriott Brampton (Respondent) v. United Food & Commercial Workers, Local 206 (Intervenor)

Unit: "all employees of 1595737 Ontario Limited o/a Courtyard by Marriott Brampton at 90 Biscayne Crescent, Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, front desk staff, office and clerical staff, and security" (57 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	2

3714-06-R: Canadian Office and Professional Employees Union Local 343 (Applicant) v. McMaster Savings and Credit Union Ltd. (Respondent)
Unit: "all employees of McMaster Savings and Credit Union Ltd. in the City of Hamilton, save and except Data & Accounting Supervisor Executive Secretary, Branch Managers and persons above the rank of Branch Manager" (12 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

3717-06-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Tate & Lyle Canada Ltd. (Respondent)

Unit: "all employees of Tate & Lyle Canada Ltd. at its Toronto refinery, save and except foremen, persons above the rank of foreman, sugar boilers, office and sales staff, assistant chemists, laboratory statisticians, packaging technicians, instrument technicians, laboratory analysts and stationary engineers employed in the boiler and power house" (141 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	141
Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	100
Number of ballots marked in favour of applicant	100

3791-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Omni Facility Services Canada Limited (Respondent)

Unit: "all employees of Omni Facility Services Canada Limited, employed at 1 and 3 Concorde Gate, and 12 Concorde Place in the City of Toronto, in the Province of Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (17 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3792-06-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. 1331493 Ontario Limited o/a Elm Management (Respondent)

Unit: "all employees of 1331493 Ontario Limited o/a Elm Management, employed at Villa Colombo Seniors Centre (Vaughan) Inc., 10443 Highway 27, in the Town of Kleinburg, City of Vaughan, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (18 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3795-06-R: Service Employees International Union, Local 2.ON, Brewery, General and Professional Workers' Union (Applicant) v. IREX (Respondent)

Unit: "all employees of IREX in Peterborough County, save and except supervisors and persons above the rank of supervisors" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

2389-06-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Chris Tranberg & Son Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

2066-06-R: Service Employees International Union Local 2.On Brewery, General and Professional Workers Union (Applicant) v. Grand Toronto Venture c.o.b. as Park Hyatt Toronto Stillwater Spa (Respondent)

Unit: "all employees of Grand Toronto Venturer c.o.b. as Park Hyatt Toronto Stillwater Spa in the City of Toronto save and except supervisors and persons above the rank of supervisor" (96 employees in unit)

Number of names of persons on revised voters' list	101
Number of persons who cast ballots	101
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	98
Number of segregated ballots cast by persons whose names appear on voter's list	6

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	49
Number of ballots marked against applicant	50
Number of ballots segregated and not counted	0

3631-06-R: Teamsters Local Union No. 938 (Applicant) v. Mobil Shred Inc. (Respondent)

Unit: "all employees of Mobil Shred Inc. in the Province of Ontario, save and except supervisors and persons above the rank of supervisor, sales, office and clerical staff" (22 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	4

3658-06-R: Canadian Union of Public Employees (Applicant) v. Brock University (Respondent)

Unit: "all employees regularly employed for not more than twenty-four hours per week in Parking Services at Brock University in the Region of Niagara, save and except supervisors and persons above the rank of supervisors and those persons covered by a subsisting collective agreement" (31 employees in unit)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	11

3749-06-R: Teamsters Local Union No. 938 (Applicant) v. Stock Transportation Ltd. (Respondent)

Unit: "all drivers and driver trainers of Stock Transportation Ltd. based in the City of Toronto, but excluding all employees based in Scarborough and covered by the existing collective agreement between Stock Transportation Ltd. and the union, and excluding all employees based in Etobicoke in the bargaining unit that is the subject of Board File No. 3363-05-R and excluding managers and persons above the rank of manager, office and clerical staff and summer students." (253 employees in unit)

Number of names of persons on revised voters' list	278
Number of persons who cast ballots	248
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	243

Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	112
Number of ballots marked against applicant	126
Number of ballots segregated and not counted	4

3824-06-R: Eastern Ontario Volunteer Firefighters Local 920 Affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. City of Greater Sudbury (Respondent)

Unit: "all volunteer firefighters as defined by subsection 1(1) of the Fire Protection and Prevention Act, 1977, employed by the City of Greater Sudbury save and except the Deputy Chief and those above the rank of Deputy Chief" (310 employees in unit)

Number of names of persons on revised voters' list	307
Number of persons who cast ballots	223
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	222
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	105
Number of ballots marked against applicant	117
Number of ballots segregated and not counted	1

3831-06-R: Teamsters Local Union No. 879 (Applicant) v. C.P.L. Systems Canada Inc. (Respondent)

Unit: "all employees working in and out of C.P.I. Systems Canada Inc., in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, accounting, office and sales staff" (16 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	6

3846-06-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Dana Canada Corporation (Respondent)

Unit: "all employees of the respondent, Dana Canada Corporation, in the City of Barrie, in the County of Simcoe, save and except Supervisors, persons above the rank of Supervisor, Managers, persons above the rank of Manager, Office, Clerical and Sales Staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (255 employees in unit)

Number of names of persons on revised voters' list	236
Number of persons who cast ballots	217
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	204
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	79
Number of ballots marked against applicant	125
Number of ballots segregated and not counted	13

Applications for Certification Withdrawn

1032-06-R: Service Employees International Union (S.E.I.U.) Local 1.on (Applicant) v. Bayshore Home Health (Respondent)

2894-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Stelco Inc. or Lake Erie Steel GP Inc. (Respondent)

2898-06-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the Town of Gananoque (Respondent)

3149-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Studio City Scaffold Ltd. (Respondent)

3523-06-R: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Eastern Ontario Terrazzo and Tile Co. (Respondent) v. Tile, Terrazzo & Marble Guild of Ontario Inc. (Intervenor)

3682-06-R: Labourers' International Union of North America Ontario Provincial District Council (OPDC) (Applicant) v. Canadian Woodland Contractors Inc. (Respondent)

3746-06-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Heritage Tiling Inc. (Respondent)

3760-06-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Cendant Car Rental Group (c.o.b. Avis Budget Group) (Respondent)

3851-06-R: Ontario Nurses' Association (Applicant) v. Briargate Retirement Living Centre (Respondent) v. Service Employees International Union, Local 1.on (Intervenor)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0037-05-R: The International Union of Painters and Allied Trades Local 1891 (Applicant) v. Yongeview Construction Ltd., Willowdale Masonry Contracting Co. Ltd., Markham Masonry Ltd. and, Micolangelo's Stucco 1643286 Ontario Limited (Respondents) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervenor) *(Withdrawn)*

1366-05-R: Labourers' International Union of North America, Local 625 (Applicant) v. Mastercraft Homes Windsor Inc.; Legacy Park Inc.; Mario Mancini and 882885 Ontario Limited (Respondent) *(Granted)*

4298-05-R: UNITE HERE Ontario Council and its Local 75 (Applicant) v. Ontario Lottery and Gaming Corporation, Windsor Raceway Inc. (Respondents) *(Withdrawn)*

0410-06-R: International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. C.I.R. Painting & Industrial Coatings Ltd. and, Final Call Painting Inc. (Respondents) *(Withdrawn)*

1713-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Universal Interiors Canada Inc., Ross Interiors Ltd. (Respondents) *(Granted)*

2248-06-R: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. B.N. Fenton Construction Ltd., 1494311 Ontario Ltd. (Respondents) *(Endorsed Settlement)*

3101-06-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Woodlawn Motel and Restaurant Inc. c.o.b. as Super 8 Motel (front Desk Unit), 1978 Holdings (Respondents) *(Granted)*

SALE OF A BUSINESS

0037-05-R: The International Union of Painters and Allied Trades Local 1891 (Applicant) v. Yongeview Construction Ltd., Willowdale Masonry Contracting Co. Ltd., Markham Masonry Ltd. and, Micolangelo's Stucco 1643286 Ontario Limited (Respondents) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervenor) *(Withdrawn)*

4298-05-R: UNITE HERE Ontario Council and its Local 75 (Applicant) v. Ontario Lottery and Gaming Corporation, Windsor Raceway Inc. (Respondents) *(Withdrawn)*

0410-06-R: International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. C.I.R. Painting & Industrial Coatings Ltd. and, Final Call Painting Inc. (Respondents) *(Withdrawn)*

1713-06-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Universal Interiors Canada Inc., Ross Interiors Ltd. (Respondents) *(Granted)*

2248-06-R: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. B.N. Fenton Construction Ltd., 1494311 Ontario Ltd. (Respondents) *(Endorsed Settlement)*

3101-06-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Woodlawn Motel and Restaurant Inc. c.o.b. as Super 8 Motel (front Desk Unit), 1978 Holdings (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1157-06-R: Dean Leavens (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Silverline Group Inc. (Intervenor) *(Granted)*

Unit: "all employees of Silverline Group Inc. engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in all sectors of the construction industry in the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (0 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	22
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	0
Number of ballots segregated and not counted	22

3486-06-R: Roel de Bruin (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. B.M. Metals Services Inc. (Intervenor) *(Granted)*

Unit: "all employees of BM Metals Services Inc. employed at or out of BM Metals Services Inc.'s yard in Azilda, Ontario, save and except office and clerical staff, sales staff, forepersons, supervisors, those above the rank of supervisor, and persons employed in the scalehouse/weigh station" (28 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	22
Number of ballots segregated and not counted	0

3500-06-R: William Laing on behalf of employees at Tate & Lyle Ltd. in Toronto (Teamsters Local Union 1979) (Applicant) v. Teamsters Canada and its Local Union 1979 Chemical, Energy and Allied Workers (Respondent) v. Tate & Lyle Canada Ltd. (Intervenor) *(Granted)*

Unit: "all employees of Tate & Lyle Canada Ltd. at its Toronto refinery, save and except foreman, persons above the rank of foreman, sugar boilers, office and persons above the rank of foreman, sugar boilers, office and sales staff, assistant chemists, laboratory statisticians, packaging technicians, instrument technicians, laboratory analysts and stationary engineers employed in the boiler and power house" (138 employees in unit)

Number of names of persons on revised voters' list	141
Number of persons who cast ballots	113
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	113
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	99
Number of ballots segregated and not counted	0

3529-06-R: John Shaw (Applicant) v. Teamsters Local Union No. 879 (Respondent) v. TF Warehousing Inc. (Intervenor) *(Withdrawn)*

Unit: "all employees of the Company at London, save and except foreman, persons above the rank of foreman, office and sales staff." (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names appear on voter's list	2

3546-06-R: Rocky St. Laurent (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Respondent) v. Action Refrigeration & Electrical (920057 Ontario Inc.) (Intervenor) *(Granted)*

Unit: "all Journeymen and Apprentice Refrigeration and Air Conditioning Mechanics, save and except person above the rank of working Foreman, employed by Employers in the Province of Ontario engaged in the Industrial, Commercial and Institutional Sector in the Refrigeration and Air Conditioning Trade." (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

3723-06-R: Aqua Mechanical Contracting Ltd. (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Respondent) *(Terminated)*

3724-06-R: Aqua Mechanical Contracting Ltd. (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Respondent) *(Terminated)*

3762-06-R: International Association of Machinists and Aerospace Workers (Applicant) v. United Food & Commercial Workers, Local 206 (Respondent) *(Withdrawn)*

3805-06-R: Jim Blais (Applicant) v. Teamsters Local Union No. #879 (Respondent) v. TF Warehouse Inc. (Intervenor) *(Granted)*

Unit: "all employees of the Company at London, save and except foreman, persons above the rank of foreman, office and sales staff" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3
Number of ballots segregated and not counted	0

3825-06-R: Dawna-Lea Hurdis (Applicant) v. Canadian Union of Public Employees and its Local 4742 (Respondent) *(Dismissed)*

REFERRAL FROM MINISTER (SECTION 115 FORMERLY SECT 109)

2720-06-M: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Independent Electricity System Operator (Respondent) *(Granted)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1666-06-U: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 and Don Duval (Respondent) *(Withdrawn)*

APPLICATIONS UNDER THE AMBULANCE SERVICES COLLECTIVE BARGAINING ACT

3694-06-M: Thames Emergency Medical Services Inc. (Applicant) v. Ontario Public Service Employees' Union, Local 147 (Respondent) *(Granted)*

3832-06-M: The Canadian Union of Public Employees and its Local 3251-PARA (Applicant) v. The Corporation of the City of Cornwall (Respondent) *(Withdrawn)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2467-02-U: Javaid Bhatti (Applicant) v. McDonnell-Ronald Limousine Service Limited cob as Airline Limousine (Respondent) *(Granted)*

0031-05-U: Shafy Ahmed Nuur (Applicant) v. Amalgamated Transit Union, Local 113 (Respondent) v. Toronto Transit Commission (Intervenor) *(Terminated)*

1163-05-U: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Controltech Electrical Inc. (Respondent) *(Withdrawn)*

2367-05-U: The Ontario Nurses' Association (Applicant) v. Shepherd Village Incorporated (Respondent) *(Withdrawn)*

2520-05-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Matas Homes and/or Matas Construction Limited and/or Matas Management Services Inc. and/or Donmar Contraplan Inc. (Respondent) *(Withdrawn)*

2601-05-U: Lise Roy (Applicant) v. CUPE Local 8888 (Respondent) v. District School Board Ontario North East (Intervenor) *(Dismissed)*

2637-05-U: UFCW Canada (Applicant) v. SNS Hotels/Restaurant c.o.b. as Brantford Holiday Inn (Respondent) *(Granted)*

3462-05-U: Brian Monk (Applicant) v. Canadian Union of Public Employees Local 241 (Respondent) v. Corporation of the City of Guelph (Intervenor) *(Withdrawn)*
3591-05-U: Jeanne P. MacNeil (Applicant) v. CUPE Local 4370 and (Respondent) v. Sarnia and District Association for Community Living (Intervenor) *(Dismissed)*

3745-05-U: Walter A. McIntyre (Applicant) v. Canadian Union of Public Employees and its Local 1943 (Respondent) *(Dismissed)*

3985-05-U: Labourers' International Union of North America, Local 493 (Applicant) v. R.M. Belanger Limited (Respondent) *(Terminated)*

0386-06-U: Ontario Public Service Employees Union (Applicant) v. G.R. Force Group Homes Inc. and, Banyan Community Services (Respondents) *(Terminated)*

0400-06-U: Gilbert McIntyre (Applicant) v. Ontario Secondary School Teachers' Federation, District 12 (Respondent) *(Dismissed)*

0411-06-U: International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. C.I.R. Painting & Industrial Coatings Ltd. and, Final Call Painting Inc. (Respondents) *(Withdrawn)*

0477-06-U: Anthony Colantonio (Applicant) v. Canadian Union of Public Employees, Local 1280 (Respondent) v. Toronto Catholic District School Board (Intervenor) *(Dismissed)*

0678-06-U: Jeremy Woodcock (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) on behalf of its Local 6571 (Respondent) v. Gerdau Ameristeel Inc. (Intervenor) *(Dismissed)*

0932-06-U: Aman Khan, Maged El-Moussaoui and Majed Jabar (Applicant) v. C.A.W. Local 195 (Respondent) v. Windsor Airline Limousine Services Limited (Intervenor) *(Dismissed)*

0988-06-U: Ederle Grimmond (Applicant) v. Canadian Union of Public Employees, Local 2926 (Office Clerical and Technical Employees) (Respondent) v. Corporation of the County of Lambton (Intervenor) *(Dismissed)*

1033-06-U; 1406-06-U: Service Employees International Union - Local 1.on ("SEIU") (Applicant) v. Bayshore Home Health ("Bayshore") (Respondent); Bayshore Health Care Ltd. carrying on business as Bayshore Home Health (Applicant) v. Service Employees International Union, Local 1.on (Respondent) *(Withdrawn)*

1114-06-U: Ontario Public Service Employees Union (Applicant) v. Canadian Blood Services (Respondent) *(Withdrawn)*

1449-06-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Aecon Construction & Materials Limited (Respondent) *(Withdrawn)*

1508-06-U: Enid McDonald (Applicant) v. Union of Needletrades, Industrial & Textile Employees, Local 75 (Respondent) v. Grand National Apparel Inc. (Intervenor) *(Dismissed)*

1909-06-U: Nyron Mohammed (Applicant) v. UNITE HERE (Respondent) v. Winners Merchants Inc. (Intervenor) *(Dismissed)*

2181-06-U: Anahid Kerkezian (Applicant) v. Service Employees International Union (Respondent) *(Withdrawn)*

2266-06-U: Service Employees International Union Local 2.On Brewery, General & Professional Workers Union (Applicant) v. Grand Toronto Venturer c.o.b. as Park Hyatt Toronto Stillwater Spa (Respondent) *(Withdrawn)*

2297-06-U: Service Employees International Union Local 2.on. Brewery, General & Professional Workers' Union (Applicant) v. Management and Training Corporation Canada (Central North Correctional Centre) and, Compass Group Canada (Beaver) Ltd. (Respondents) *(Dismissed)*

2348-06-U: Donald Dallas (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647 (Respondent) v. Cara Operations Limited, Airport Services Division (Intervenor) *(Dismissed)*

2613-06-U: Ontario English Catholic Teachers' Association (Applicant) v. Algonquin – Lakeshore Catholic District School Board and Felicia Melino (Respondent) *(Withdrawn)*

2645-06-U: Fred Julien (Applicant) v. National Automotive, Aerospace, Transport and General Workers Union of Canada (CAW Canada), Local 124 (Respondent) v. AGS Automotive Inc. (Intervenor) *(Withdrawn)*

2715-06-U: Joney Prasad (Applicant) v. Ontario Federation of Health Care Workers, LIUNA, Local 1110 (Respondent) *(Withdrawn)*

2884-06-U: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vidak Kovacevic o/a City Electric (Respondent) *(Granted)*

2885-06-U: Canadian Union of Public Employees (Applicant) v. I.O.O.F. Senior Citizen Homes Inc. (Respondent) v. Christian Labour Associatio of Canada (Intervenor) *(Withdrawn)*

2901-06-U: Ontario Public Service Employees Union and its Local 565 (Applicant) v. The Alcohol & Gaming Commission of Ontario (Respondent) *(Withdrawn)*

2905-06-U: Dorrett Blair (Applicant) v. Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Respondent) v. Specialty-Care Mississauga Road (Intervenor) *(Endorsed Settlement)*

3042-06-U: Fay Fagan (Applicant) v. Ontario Federation of Health Care Workers, L.I.U.N.A. Local 1110 (Respondent) v. Cawthra Gardens Long Term Care Incorporated (Intervenor) *(Endorsed Settlement)*

3046-06-U: Danny Philip Chaves (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 8328 (Respondent) v. Welded Tube of Canada (Intervenor) *(Dismissed)*

3095-06-U: Martyn W. Jefferson (Applicant) v. I.A.T.S.E. Local 873 (Respondent) *(Dismissed)*

3144-06-U: David Voutour (Applicant) v. Steelworkers Local 1-2693 (Respondent) *(Withdrawn)*

3202-06-U: Andrew Ackerman (Applicant) v. Steel Workers of America Local Union 5296 (Respondent) *(Withdrawn)*

3216-06-U: Akhtar Agha (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW, Local 200 (Respondent) v. MTS Allstream Inc. (Intervenor) *(Dismissed)*

3268-06-U: Hyacinth Saunders (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Respondent) v. Radisson Hotel Toronto East (Intervenor) *(Withdrawn)*

3319-06-U: Shanta Sandhu (Applicant) v. CUPE Local 4248 (Respondent) *(Withdrawn)*

3348-06-U: Carol Melelis (Applicant) v. Local 1.on SEIU (Respondent) *(Withdrawn)*

3358-06-U: United Food and Commercial Workers Union, Local 1977 (Applicant) v. Westmount Price Chopper (Respondent) *(Withdrawn)*

3625-06-U: Vito Fiordalisi (Applicant) v. Labourer's International Union Local 506 (Respondent) *(Withdrawn)*

3626-06-U: Pat Caruso (Applicant) v. Labourers International Union of North America Local 506 (Respondent) *(Withdrawn)*

3671-06-U: Canadian Union of Public Employees and its Local 3851 (Applicant) v. Nelson House (Respondent) *(Withdrawn)*

3709-06-U: Labourers' International Union Of North America, Local 625 (Applicant) v. LaSalle Backhoe Service (Respondent) *(Withdrawn)*

3711-06-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Amlap Corporation Inc. (Respondent) *(Withdrawn)*

3741-06-U: Firoz Ramji (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) *(Dismissed)*

3816-06-U: Canadian Union of Public Employees (Applicant) v. A Place Called Home (Respondent) *(Withdrawn)*

3837-06-U: Teamsters Local Union No. 938 (Applicant) v. Mobil Shred Inc. (Respondent) *(Withdrawn)*

3921-06-U: Canadian Union of Public Employees (Applicant) v. Kids and Company (Respondent) *(Withdrawn)*

3943-06-U: International Association of Machinists and Aerospace Workers (Applicant) v. 1595737 Ontario Limited o/a Courtyard by Marriott Brampton (Respondent) *(Withdrawn)*

APPLICATIONS FOR INTERIM ORDER

3540-06-M: The International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) (Applicant) v. Wallaceburg Preferred Partners Corp. (Respondent) *(Dismissed)*

4042-06-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Vicor Mechanical Ltd. (Respondent) *(Withdrawn)*

TRUSTEESHIP

3350-05-T: United Brotherhood of Carpenters and Joiners of America (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

0991-06-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Bruce Power LP and, Sheet Metal Workers' International Association, Local 473 (Respondents) *(Dismissed)*

1050-06-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Vollmer & Associates and, Millwrights Regional Council of Ontario and its Local 1244, Sheet Metal Workers' International Association, Local 235 and (Respondents) *(Withdrawn)*

2556-06-JD: The Ottawa Hospital (Applicant) v. The Ontario Public Service Employees Union (Respondent) v. The Ontario Nurses' Association (Intervenor) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2296-06-M: Neil-Wycik Co-Operative College Inc. (Applicant) v. Canadian Union of Public Employees, Local 1281 (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1059-05-OH: David J. Milton (Applicant) v. Dominion Colour Corp. and, Vasilios Tsakaloglou (Respondents) v. Teamsters Chemical, Energy and Allied Workers Local 1979 (Intervenor) *(Withdrawn)*

1097-06-OH: Andrzej Orlowski (Applicant) v. Apotex Inc. (Respondent) *(Dismissed)*

1934-06-OH: Gianpiero Crocco (Applicant) v. TMMC Inc. (Respondent) *(Withdrawn)*

2441-06-OH: Dale Vokey (Applicant) v. Metal Processing Technologies/M P Tech Corp. (Respondent) v. Bruce Schaumber (Intervenor) *(Withdrawn)*
2818-06-OH: Sally Rhoads (Applicant) v. Bles Farms Ltd. (Respondent) *(Withdrawn)*

3043-06-OH: Paul D. Caldwell (Applicant) v. Engineered Solutions Corporation (Respondent) *(Terminated)*

3044-06-OH: Jon Paul Evans (Applicant) v. Courtesy Auto Sales (Respondent) *(Dismissed)*

3271-06-OH: Donovan Alliman (Applicant) v. Ontario Federation for Cerebral Palsy (Respondent) *(Withdrawn)*

3332-06-OH: Grace Mungal., Hector Waldron, and, OPSEU (Applicants) v. Community Living Mississauga (Respondent) *(Terminated)*

CONSTRUCTION INDUSTRY GRIEVANCES

2509-05-G: Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Union Local 598 (Applicant) v. C & A Tedesco Waterproofing Inc. (Respondent) *(Withdrawn)*

3537-05-G: International Union of Operating Engineers, Local 793 (Applicant) v. Aecon Utilities, A division of Aecon Construction Group Inc. (Respondent) *(Withdrawn)*

0412-06-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. C.I.R. Painting & Industrial Coatings Ltd. and, Final Call Painting Inc. (Respondents) *(Withdrawn)*

1305-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Derbtile Construction Inc. (Respondent) *(Withdrawn)*

2249-06-G: Universal Workers Union, Labourers International Union of North America, Local 183 (Applicant) v. B.N. Fenton Construction Ltd., 1494311 Ontario Ltd. (Respondents) *(Endorsed Settlement)*

2544-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Diamond Drywall Contracting Inc. (Respondent) *(Endorsed Settlement)*

2624-06-G: Labourers' International Union of North America, Local 506 (Applicant) v. Seron Construction Limited (Respondent) *(Granted)*

2660-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. Core-Crete Ltd. (Respondent) *(Granted)*

2761-06-G; 3423-06-G: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Frank Slywka c.o.b. as Leyland Construction (Respondent); Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Frank J. Slywka c.o.b. as Leyland Construction (An Unregistered Business Name) (Respondent) *(Granted)*

2994-06-G: Core-Crete Ltd. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) *(Withdrawn)*

3296-06-G: Labourers' International Union of North America, Local 506 (Applicant) v. E.S. Fox Construction Ltd. (Respondent) *(Granted)*
3438-06-G: Labourers' International Union of North America, Local 625 (Applicant) v. Greater Essex County District School Board (Respondent) *(Endorsed Settlement)*

3564-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. E.P. Siding Inc. (Respondent) *(Endorsed Settlement)*

3595-06-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Tilbury Concrete Inc. (Respondent) *(Endorsed Settlement)*

3644-06-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. 1290771 Ontario Inc. and/or, Garrcorp Industries Inc. (Respondents) *(Endorsed Settlement)*

3674-06-G: Construction Workers Union Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. DC Corex Construction Inc. (Respondent) *(Granted)*

3712-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. Weston Excavating & Grading Co. Ltd. (Respondent) *(Granted)*

3719-06-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. King Glass Ltd. (Respondent) *(Granted)*

3721-06-G: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. 880530 Ontario Inc. c.o.b. as Cahill Electric (Respondent) *(Withdrawn)*

3734-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Napa Valley Trim Inc. (Respondent) *(Endorsed Settlement)*

3763-06-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter know as "Carpenter Local Unions participating in the OPC Trust Funds" (Applicant) v. Gagne Holdings Inc. c.o.b. as Northwade Contracting Inc. (an unregistered corporation) (Respondent) *(Granted)*

3769-06-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. A.T.S. Erectors Inc. (Respondent) *(Granted)*

3784-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. Econo Excavating and Paving (1991) Co. Ltd. (Respondent) *(Granted)*

3788-06-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Yukon Construction Inc. (Respondent) *(Endorsed Settlement)*

3790-06-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Madrid Carpentry Services (Respondent) *(Granted)*

3798-06-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter know as "Carpenter Local Unions participating in the OPC Trust Funds" (Applicant) v. Atlan 4 Construction Inc. (Respondent) *(Granted)*

3842-06-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter know as "Carpenter Local Unions participating in the OPC Trust Funds" (Applicant) v. Polvian Construction Limited c.o.b. as the Faga Group Ltd. (Respondent) *(Granted)*

3843-06-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in OPC Trust Funds") (Applicant) v. Westwood Drywall Inc. (Respondent) *(Granted)*

3847-06-G: Labourers' International Union of North America, Local 837 (Applicant) v. Harbridge & Cross Limited (Respondent) *(Withdrawn)*

3852-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. City of Toronto (Respondent) *(Withdrawn)*

3866-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. DRS Structural Inc. (Respondent) *(Granted)*

3888-06-G: International Union of Operating Engineers, Local 793 (Applicant) v. X-Act Crane Ltd. (Respondent) *(Granted)*

3925-06-G: Ontario Sheet Metal Workers' and Roofers Conference (Applicant) v. Medcon Mechanical Ltd. (Respondent) *(Granted)*

3940-06-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. El Decor Ltd. (Respondent) *(Endorsed Settlement)*

3962-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Eagle Welding & Steel Erecting (Respondent) *(Dismissed)*

3975-06-G: International Union of Bricklayers and Allied Craftworkers, Local 28 (Applicant) v. Star Cement & Tile Company Ltd. (Respondent) *(Withdrawn)*

3984-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. and, Oreste Perruzza (Respondents) *(Endorsed Settlement)*

3985-06-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yukon Construction Inc. (Respondent) *(Endorsed Settlement)*

4036-06-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. 1198934 Ontario Inc. o/a Basic Structure Engineering Glazing Contractors (Respondent) *(Granted)*

4037-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Power Environmental Service Inc. A Division of 1617569 Ontario Limited (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

3648-03-ES: John Perkins (Applicant) v. Controlex Realty and Director of Employment Standards (Respondents) *(Terminated)*

1176-04-ES: 1539058 Ontario Inc. o/a Omni 2 JewelCrafters (Applicant) v. Jack Ohayon and Director of Employment Standards (Respondents) *(Granted)*
3926-05-ES; 0190-06-ES: Nadia Lambo (Applicant) v. Bloorguard Investment Company Limited and Director of Employment Standards (Respondents) *(Withdrawn)*

4198-05-ES: Tony Russo (Applicant) v. Westfair Foods Ltd., Director of Employment Standards (Respondents) *(Withdrawn)*

4217-05-ES: Commercial Spring and Tool Company Limited (Applicant) v. Nemesio Lazo Gutarra, and Director of Employment Standards (Respondents) *(Granted)*

0366-06-ES: Kerry-Lynn Gleason o/a The Art of Spa and Skincare (Applicant) v. Kasandra Poirier and Director of Employment Standards (Respondents) *(Withdrawn)*

0784-06-ES: Creyos Batchelor (Applicant) v. Oakville Honda, Director of Employment Standards (Respondents) *(Granted)*

0785-06-ES: Wayne O'Brien (Applicant) v. University of Ottawa and Director of Employment Standards (Respondents) *(Terminated)*

0881-06-ES: Cover-All Computer Services Corp. (Applicant) v. Paul Lowe and Director of Employment Standards (Respondents) *(Dismissed)*

0969-06-ES: Iyad Habib (Applicant) v. Gemma Communications and. Director of Employment Standards (Respondents) *(Terminated)*

1132-06-ES: Mafina Air Technologies Inc. (Applicant) v. Min Zhao Zhong, Director of Employment Standards (Respondents) *(Dismissed)*

1173-06-ES: JB's Mongolian Grill (Applicant) v. Chrystal Schram and Director of Employment Standards (Respondents) *(Dismissed)*

1177-06-ES: Ian Harper (Applicant) v. Everyday Maintenance Ltd., Director of Employment Standards (Respondents) *(Granted)*

1900-06-ES: Naser Farsijani (Applicant) v. Vesco Elek Operating as Bodo, Director of Employment Standards (Respondents) *(Granted)*

2291-06-ES: Diane Brozina (Applicant) v. Integra Investigation Services Ltd., Director of Employment Standards (Respondents) *(Withdrawn)*

2733-06-ES: Kasend Ngomba (Applicant) v. Disabled Persons' Community Resources and Director of Employment Standards (Respondents) *(Terminated)*

2736-06-ES: Rong Zhou (Applicant) v. Allstate Insurance Company of Canada and Director of Employment Standards (Respondents) *(Withdrawn)*

2747-06-ES: RPT Holdings Ltd. o/a Fitness Tech International (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

3063-06-ES: Barbara Agnew (Applicant) v. Director of Employment Standards (Respondent) *(Dismissed)*

3098-06-ES: Michael Hecker (Applicant) v. Bass Lake Roadhouse, Director of Employment Standards (Respondents) *(Dismissed)*

3198-06-ES: Dae-Won Jeong operating as DJ Infosys (Applicant) v. Jang-Chul Kim, Director of Employment Standards (Respondents) *(Terminated)*

3258-06-ES: Gerald A Poulin (Applicant) v. Le Centre D'Habitation De Chelmsford Inc., Director of Employment Standards (Respondents) *(Terminated)*

3315-06-ES: 2046480 Ontario Inc. (Applicant) v. Lucky Noor, Maria Garzon, Yoima Novo, Cidalia Gargia, Fourozan Sangian, Luz Adriana Valdez and, Director of Employment Standards (Respondents) *(Terminated)*

3355-06-ES: Chatsworth Project and Construction Management Inc. (Applicant) v. Steve Hutchins and Director of Employment Standards (Respondents) *(Dismissed)*

3410-06-ES: Natalia Moliboga (Applicant) v. Aqua Pure Systems Company and Director of Employment Standards (Respondents) *(Dismissed)*

3585-06-ES: Canadian Job Bank Agency Incorporated (Applicant) v. Luis Valenzuela and Director of Employment Standards (Respondents) *(Dismissed)*

3778-06-ES: John L. Prout (Applicant) v. 1423087 Ontario Inc. o/a Platinum Air Care and Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

2257-04-HS: David Cockburn (Applicant) v. Inco Ltd. and, Dan Methe, Inspector (Respondents) *(Withdrawn)*

0727-06-HS: Toronto Automobile Dealers Association (Applicant) v. Neil Martin, Inspector (Respondent) *(Withdrawn)*

2850-06-HS: Humber River Regional Hospital (Applicant) v. Service Employees International Union, Local 1.on, Ontario Public Service Employees Union, Ontario Nurses Association, Shela Mirza, Inspector (Respondents) *(Withdrawn)*

2917-06-HS: United Steelworkers of America, Local 7135 (Applicant) v. National Steel Car Ltd. , Brian Yasvinski, Inspector (Respondents) *(Withdrawn)*

3487-06-HS: Atlantic Packaging Products Ltd. (Applicant) v. Lorne Kalb and Richard Croswell, Inspector (Respondents) *(Withdrawn)*

3495-06-HS: Ministry of Labour (Applicant) v. Ontario Public Service Employees Union and Roger Fontaine, Inspector (Respondents) *(Granted)*

3740-06-HS: Liberty Staffing (Applicant) v. Inspector (Respondent) *(Dismissed)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

2400-06-PS: The Canadian Union of Public Employees and its Local(s) 252 and 2491 (Applicant) v. Providence Continuing Care Centre (St. Vincent's) and Brockville General Hospital (Respondent) v. Ontario Public Service Employees Union (Intervenor) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2930-04-JD: Labourers' International Union of North America, Local 837 (Applicant) v. International Union of Operating Engineers, Local 793., Priestly Demolition Inc. and Dufferin Construction Company (Respondents) v. Ontario Association of Demolition Contractors Inc. (Intervenor) *(Dismissed)*

3070-04-OH: Kym Urry (Applicant) v. Transhelp of the Regional Municipality of Peel (Respondent) v. Canadian Union of Public Employees Local 966 Transhelp (Intervenor) *(Dismissed)*

4127-04-U: Bobby Maharaj (Applicant) v. Amalgamated Transit Union Local 1572 (Respondent) v. Corporation of the City of Mississauga Transportation and Works Department (Intervenor) *(Dismissed)*

0617-05-OH: Joe Rooke (Applicant) v. Stelco Hamilton (Respondent) *(Dismissed)*

2387-05-PE: Helping Hands Daycare 841986 Ontario Ltd. (Applicant) *(Dismissed)*

3638-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Terex Earth Services, 1565671 Ontario Ltd. (Respondents) *(Dismissed)*

3986-05-U: Kenneth William Bruce (Applicant) v. Ontario Secondary School Teachers Federation, District 9 (Respondent) v. Greater Essex County District School Board (Intervenor) *(Dismissed)*

0323-06-U: Gabriel Mebratu (Applicant) v. United Food and Commercial Workers International Union, Local 333 (Respondent) *(Dismissed)*

1304-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Derbtile Construction Inc. (Respondent) *(Granted)*

1518-06-R: Yang, Mee Ok (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newsmedia Guild (Respondent) v. The Korea Times Daily (Intervenor) *(Dismissed)*

1738-06-ES: 2058761 Ontario Ltd o/a Kipling Kar Wash (Applicant) v. Angel Caceres and Director of Employment Standards (Respondents) *(Dismissed)*

1785-06-U: Tom R. Thomson (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) *(Dismissed)*

2386-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1425105 Ontario Inc. o/a Les Burch & Son Contracting (Respondent) *(Withdrawn)*

3373-06-ES: Robert A. Yaansah, a Direct of 6377289 Canada Inc. o/a Eurodesign Furniture Ltd. (Applicant) v. Yu Tang, Janina Bobryznska, Liane Jardine, Maria Digregorio, Nino Noe Aloise , Rajeshwar Sharma, Norina Fuoco, Gino Figliomeni, Ruben Ramirez, Jose Rodriquez, Tadeusz Szut and, Director of Employment Standards (Respondents) *(Dismissed)*

SECTOR DETERMINATION (SECTION 153) (FORMERLY S.150)

1465-06-M: Canadian Union of Skilled Workers (Applicant) v. Burns and Roe Enterprises Inc. and , Greenfield Energy Centre LP (Respondents) v. Sarnia Construction Association, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America , Operative Plasterers', Cement Masons' and Restoration Steeplejacks' International Association of the United States and Canada, Local 598, Millwright Regional Council of Ontario, Ontario Sheet Metal Workers' & Roofers' Conference, I.B.E.W. Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 530, International Union of Operating Engineers, Local 793, Construction Employer's Coordinating Council of Ontario (Intervenors) *(Dismissed)*

PROJECT AGREEMENT APPLICATIONS (S.163.1(1))

1182-06-PR; 1635-06-PR: Ontario Pipe Trades Council United association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 (Applicant) v. Greenfield Energy Centre LP, Burns and Roe Enterprises Inc. (Respondents) *(Withdrawn)*; Greenfield Energy Centre LP (Applicant) *(Terminated)*

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